Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

PENSACOLA CONSTRUCTION CO.,

Petitioner,

vs.

TYGER CONSTRUCTION COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment guarantee of trial of issues of fact by jury is abrogated by a de novo review on appeal of the weight which the jury should have accorded testimony by a qualified expert admitted at trial.

2. Whether under Federal Rule of Evidence 705 the court on appeal may exclude the opinion of a qualified expert by concluding there is not a sufficient basis for the opinion when the basis for the opinion was never challenged on cross examination.

3. Whether the reasonableness of the opinions of a qualified expert are matters going to the weight of the evidence rather than admissibility.

PARTIES TO THE PROCEEDINGS

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JURISDICTION

Pensacola seeks review of the opinion and judgment of the Fourth Circuit Court of Appeals rendered on July

8, 1994. Pensacola's Motion for Reconsideration of the Fourth Circuit's decison was denied on August 2, 1994. (App. 94). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Federal Rule of Evidence 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Federal Rule of Evidence 705:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

United States Constitution, Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Pensacola Construction Co. seeks a writ of certiorari so that this Court might review the decision of a panel of the Fourth Circuit Court of Appeals in overturning a significant portion of the damages awarded to Pensacola by a jury on Pensacola's misrepresentation claims against Tyger Construction Co. The Fourth Circuit overturned a portion of Pensacola's damages after it determined that expert testimony submitted by Pensacola on its damages was inadmissible. Pensacola and Tyger formed a joint venture in 1985, its primary purpose being the construction of sand islands in the James River. (Joint Appendix on Review to the Fourth Circuit, hereinafter "J.A.," 1221). Tyger was responsible for contributing 60% to the joint venture and Pensacola was responsible for contributing 40%. (J.A. 1221). Tyger was responsible for the day to day activities and management of the joint venture. (J.A. 1221). One of the most costly portions of the mining and project was the supplying of the sand to build the islands. (J.A. 1222).

When the cost of the project grossly exceeded the initial estimate by $20,000,000 and Tyger refused to give Pensacola reasons for such extra costs, Pensacola refused to make any further capital contributions. Tyger filed suit against Pensacola alleging a breach of the contract by Pensacola's failure to make such capital contributions. (J.A. 26). Pensacola filed a counterclaim alleging that Tyger misrepresented to Pensacola that a specific sand pit which was essential to complete the work economically, the "Waitman pit", had been secured by Tyger. (J.A. 43). Pensacola had decided to join the joint venture and bid on the project based upon the cost estimates of obtaining

sand from the Waitman pit. (J.A. 147-49, 1451-53, 1551-52). When the representation as to the availability of the Waitman pit was not true, the joint venture had to mine from different locations. These locations proved to be less efficient because of the depth required to mine the sand and the corresponding wetness of the sand. This, in turn, substantially increased expenses on the sand operations on the project. (J.A. 43).

A first trial was conducted in which Pensacola sought $5.6 million in damages as a result of Tyger's misrepresentation concerning the availability of Waitman. The unavailability of Waitman resulted in cost overruns of $14 million on the sand operation. (Pensacola was required to contribute 40% in the joint venture and thus the cost to Pensacola of the overrun was 40% of $14 million, or $5.6 million). (J.A. 727-28). Pensacola sought these damages on the "total cost" theory, arguing that all additional costs of the sand operation were caused by the slower removal and delivery of sand from the alternate sand pits. The jury awarded Pensacola the $5.6 million sought in the first trial. (J.A. 1225). The trial judge overturned the verdict on the basis that the damages were against the weight of the evidence and ordered a new trial. (Appendix to the Petition, hereinafter "App. 7-8"). Pensacola appealed this ruling.

At the second trial, Pensacola itemized its damages and sought only $3,919,790 as opposed to the $5.6 million originally sought. (J.A. 2564). Pensacola calculated $9,799,474 as the additional cost on the project as a result of Tyger's failure to secure the Waitman pit. (J.A. 2564, 1834-36). The extent of the additional costs was established by the expert testimony of its President, Henry B.

McCoy Jr. Mr. McCoy testified about damages in several categories, four of which were relevant to the appeal to the Fourth Circuit: (1) increased costs of mining an uneconomical pit, (J.A. 1828-30), (2) increased costs due to additional time spent on sand operations as a result of inefficient sand production from the alternate pit, (J.A. 1830-33), (3) excess supervisor salaries at the pits due to additional time caused by inefficient sand production, and (4) an increased Disadvantaged Business Enterprise fee paid for the move to the alternate pit.

McCoy determined Pensacola's damages in these areas by first calculating the difference in productivity of the alternate sand pit verses the estimated productivity of the Waitman pit. (J.A. 2564, 1810-36). McCoy determined the costs of mining the alternate sand pit based on the joint venture's cost records. (J.A. 1810-13). McCoy then calculated an estimated cost of mining the Waitman pit based on the actual costs incurred in mining a similar pit. (J.A. 1813-14). Dividing the costs of mining the uneconomical alternate pit by the estimated cost of mining the Waitman pit, McCoy determined that mining the alternate pit was 48.96% as efficient as mining the Waitman pit would have been. (J.A. 1829-31). McCoy then utilized this efficiency factor to determine that because the sand mining was 48.96% as efficient as it would have been had the Waitman pit been secured, the necessity of mining sand from the alternate pit would account for a 48.96% reduction in the productivity of the sand operations, which was dependant on the amount of sand coming from the pit. (*Id.*) By this method, McCoy determined that the sand operation took an additional 5.88 months to complete

than it would have taken had the Waitman pit been available. (J.A. 1831).

In performing his calculations, McCoy relied on numerous documents which were admitted into evidence, including: work sheets of Tyger's cost accountant for the project, extensive cost reports maintained on the project by Tyger, inventory reports from the sand pits actually mined, the original sand estimate for the Waitman pit from which sand would have been obtained had it been secured by Tyger, daily reports of activities on the project, summary production reports, and other project documents. (J.A. 1780). Tyger never challenged the reliability of these documents because they were Tyger's own documents. Tyger never disputed that these documents were not the type reasonably relied upon by experts in the field. In addition to relying on these documents, McCoy based his conclusions on his past experience doing such work and on his personal visits and observations of the project. (J.A. 1774-83).

On the uneconomical pit calculation, McCoy testified that he believed that the mining operations at the alternate pit were more costly and less productive than the Waitman pit would have been because the joint venture was forced to mine more from the alternate pit than was economical for a pit of that nature. McCoy explained:

> We had mined the economical sand out of this mine. We had no other place to go. Therefore we had to widen out the pit, we had to go deeper, which required more dewatering, wetter sand to handle and haul. We were hauling water instead of sand. We had to rehandle the material by

> digging deeper. The haul roads would be steeper coming out of the pit.

(J.A. 1820). The minutes of meetings of the joint venture, also part of the evidence, confirm that the sand was very expensive to mine. (J.A. 2547). The jury agreed awarding Pensacola $1,270,122 for these costs.

The Court of Appeals in its opinion recognized that John Johnson, the joint venture's project manager, did testify that the Eppes mine was more expensive to mine because water had to be pumped from the mine and that the sand from the Eppes mine presented maintenance problems because of its moisture content. (App. 16). In fact, in the trial court's own examination of McCoy, he testified that the job was delayed due to a lack of sand source. McCoy reiterated that "if that sand had been mined at Waitman, it would have been mined in half the time and we could have moved it out faster." (J.A. 1906).

The trial court qualified Mr. McCoy as an expert " . . . in assessing costs, expenses, and losses in projects such as the one in issue in this lawsuit and the preparation of estimates and the review of cost accounting reports, and in the analysis of construction methods for projects such as at issue in this lawsuit." (App. 7). Thus, there was no issue in this case as to the qualification of Mr. McCoy to testify on these issues. Prior to McCoy's testimony, however, Tyger sought to have all of McCoy's testimony excluded because McCoy has "neither the knowledge, the skill, the experience, the training, nor the education to qualify in this Court to testify with respect to this complex and convoluted damage calculation that he has put together." (J.A. 1273). The trial judge correctly

denied Tyger's motion on the basis that Tyger's objections went to the weight of McCoy's testimony rather than its admissibility. (J.A. 1277-79, 1372-73). The trial court ruled that, once qualified as an expert, Rule 705 allows the expert to render his opinions without providing the basis for that opinion. The burden for establishing the absence of underlying support falls upon the cross-examiner as the trial court aptly stated:

> That is your role as an advocate, and then it is your role as an advocate to argue to a jury that this opinion is not properly based in fact, it should not be given much weight by the jury, if any at all. And I think that basically where you say that there are fallacies in the analysis and fallacies in the reasoning process and in the bases, that those are matters for cross-examination and argument. I make that general ruling in regard to what you said.

After the second trial was completed, Pensacola was awarded $1,578,250 or 40% of $3,945,627 instead of the $9,799,474 which Pensacola sought. (J.A. 2596-97). Of the $3,945,627 the jury awarded, $1,268,448 was for the increased costs of mining the alternate pit, $1,270,122 was for the increased costs incurred as a result of the additional time on the project due to reduced sand production, $90,543 was for excess supervisor salaries, and $38,866 was for the excess DBE fee. (J.A. 2597). Tyger appealed the jury's award for these items based upon Tyger's assertion there was error in the admission of McCoy's testimony.

On appeal, with the facts noted above before them, the Fourth Circuit held that "[e]xpert opinion evidence

based on assumptions not supported by the record should be excluded." (App. 15). The Fourth Circuit cited to Rules 703 and 705 of the Federal Rules of Evidence but did not indicate how its conclusions were derived from those rules. Notwithstanding the lack of authorization in the federal rules for disregarding McCoy's expert testimony, the Fourth Circuit then evaluated the record and determined that "[i]t was an abuse of discretion for the trial court to admit McCoy's testimony that the delays in construction were caused by a lack of, or inefficiencies in the production of, sand. This error resulted from the trial judge's belief, *expressed at the time it denied the motion in limine* as to McCoy's testimony, that the question of whether an expert's opinion had an adequate basis in fact "should be handled by opposing counsel through cross-examination and in jury argument." (App. 15).

The Fourth Circuit determined that McCoy's calculation of the costs incurred as a result of having to mine a less efficient pit should have been excluded because McCoy could not quantify the costs associated with the individual factors that may have caused the pit to be less economical, and because "McCoy himself never causally linked the rehandling, dewatering and reclamation to his damage calculations for mining an uneconomical pit." (App. 16). In addition, the Fourth Circuit also stated that there was no analysis in the record as to a comparison between the Waitman pit and the pit McCoy used to estimate the costs of mining the Waitman pit and therefore McCoy's "conclusory statement that the [two pits] were similar mines is without factual support in the record and should have been excluded." (App. 16-17). The court also notes that the record did not support

McCoy's utilization of a learning curve to adjust his figures. (App. 17).

The Fourth Circuit concluded that McCoy's calculation as to additional costs incurred as a result of a reduced production of sand should not have been admitted, because "the evidence is uncontradicted that a sand stockpile existed during the twelve month period that McCoy used in his calculation, and that the sand operation was delayed for reasons other than Tyger's failure to produce the Waitman pit." (App. 15). The Fourth Circuit erroneously believed that the existence of the stockpile of sand creates an inference that production of sand at the alternate site did not slow progress on the project. The court did note, but ignored, admissions made by Tyger officers and employees that the reduced sand production was slowing the job, but in its verifying the evidence discounts these statements. (App. 14-15). For example, Paul Sylvestri, Vice President of Tyger in charge of the project, testified that "the joint venture needed to get the sand source because the lack of sand was delaying the job." (J.A. 1650). Tyger's own president, John Goodier, acknowledged that the joint venture incurred additional costs because of the lack of a sand source and testified that the lack of sand "was a continuing problem on the site." (J.A. 1666-67). The minutes of the final joint venture meeting confirmed that sand production was one of the key factors that extended the schedule and caused most of the cost increase. (J.A. 2546).

McCoy testified that the joint venture originally planned on mining approximately 200,000 yards of sand per month, but only mined less than 100,000 per month due to the change in sand source and this prolonged

work on the project. (J.A. 1883-84). McCoy also testified that the project needed eight barges of sand a day to operate efficiently, but they were not even able to ship six barges of sand per day. (J.A. 1906).

The excess supervisor salaries and DBE fee claims were overturned because they were based on the same calculations that the Fourth Circuit found unsupported and thus inadmissible. (App. 19).

With the possible exception of McCoy's learning curve adjustments, the Fourth Circuit made no determination as to the validity of McCoy's methodology, the reliability of the data used by McCoy, or McCoy's mathematical computations.

Implicit and explicit in the Fourth Circuit's opinion are a number of erroneous holdings:

1. The basis for an expert's opinion must be set forth in evidence in order for that opinion to be considered by the trier of fact;

2. The proponent of expert testimony bears the burden of setting forth the basis for the expert's conclusions;

3. Whether an expert's conclusions are adequately supported by the evidence in the case is a matter going to the admissibility of expert testimony, not to the weight of the evidence, and cannot be left to the trier of fact;

4. Appellate courts may weigh the evidence supporting or undermining an expert's conclusions to determine if the expert's

conclusions are entitled to be considered by the trier of fact.

Each of these are contrary to the law.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction of this action is founded on 28 U.S.C. § 1332. There was diversity of citizenship between the parties and the amount in controversy, exclusive of costs, exceeded $10,000.

ARGUMENT ON REASONS FOR ALLOWANCE OF THE WRIT

1. **The decision below adds to the substantial confusion and conflict that exists within and between the various federal courts of appeal on issues affecting the majority of civil cases before the federal courts as to the admissibility of expert testimony concerning:**

   a. **whether the trier of fact may consider an expert's conclusion if the basis for that conclusion is not in evidence,**

   b. **whether the proponent of expert testimony bears the burden of setting forth the basis of the expert's conclusion, and**

   c. **whether evidence conflicting with an expert's conclusion goes to the weight of the expert's testimony, or its admissibility.**

The Fourth Circuit's opinion in this case, as it is based on the propriety of the admission of expert testimony over

an objection going to the reasonableness of the conclusions reached by the expert, raises questions in an area long ignored by this Court. Edward L. Imwinkelried, *Judge versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?* 25 Wm. & Mary L. Rev. 577 (1984). The Fourth Circuit's opinion raises questions as to the procedure to be utilized by trial judges under the Federal Rules of Evidence in determining the admissibility of expert conclusions.

The Fourth Circuit's opinion first raises issues about the foundation, if any, necessary to submit expert testimony to a jury and who bears the burden of establishing that foundation – or the lack of foundation. By holding that the trial judge abused her discretion in not granting Tyger's motion in limine, the Fourth Circuit is placing the burden of setting forth the reasonableness of the basis for an expert's opinion on the party producing the expert. This is contrary to the Federal Rules of Evidence and decisions from the majority of federal courts of appeal that have considered this question. Under the Fourth Circuit's view, setting forth the basis for an expert's opinion is a foundational requirement to the expert's testimony. *See also Lewis v. Parish of Terrebonne*, 894 F.2d 142, 146 (5th Cir. 1990) ("an expert's opinion must be preceded by facts in evidence . . . "). This view is contrary to Rule 705 of the Federal Rules of Evidence, which clearly allows an expert to give an opinion without setting forth any basis whatsoever for the opinion. Fed. R. Evid. 705.

Although Rule 705 allows a trial judge to require disclosure of the underlying facts or data which form the basis of an expert's opinions prior to the admission of the

expert's testimony. Fed. R. Evid. 705, Rule 705 does not require such disclosure whenever an objection is raised as to the reasonableness of an expert's conclusions. It is also contrary to Rule 703, which allows an expert's opinion to be based on inadmissible evidence. Fed. R. Evid. 703. For these reasons, courts have held that a trial judge cannot exclude an expert's opinion simply because no basis was set forth for the opinion unless either the trial judge requires disclosure of the basis for the opinion or the opposing party demonstrates the lack of a reasonable basis on cross-examination of the expert. With respect to admissibility of an expert's opinion, where the court does not require preliminary disclosure of the basis, the sole focus is on whether a complete lack of a reasonable basis is established on cross-examination. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc.*, 998 F.2d 1224, 1240 (3rd Cir.), *cert. denied*, 114 S.Ct. 554 (1993); *Ambrosini v. Labarraque*, 966 F.2d 1464, 1468-69 (D.C. Cir. 1992).

Most courts follow Rule 705 holding that the burden of establishing the reasonableness, or lack thereof, of an expert's conclusions rests on the party opposing the testimony and that this burden is to be carried on cross-examination. *See, e.g., International Adhesive Coating Co., Inc. v. Bolton Emerson Intern., Inc.*, 851 F.2d 540 (1st Cir. 1988); *Smith v. Ford Motor Company*, 626 F.2d 784, 793 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981); *Adams v. Sewell*, 946 F.2d 757, 768 (11th Cir. 1991). By refusing to allow the jury to consider expert opinions when the basis

for those opinions are not fully set forth in direct evidence nor elicited on cross-examination, the Fourth Circuit's opinion is contrary to Rule 705 and the decisions construing it.

The Fourth Circuit's opinion requiring the disclosure of the basis for an expert's opinion as a requirement to its admission is of grave concern. As occurred in this case, a party relying on Rule 705 may choose to submit an expert's conclusions without going through the time-consuming process of disclosing the entire basis for that expert's conclusions and leaving it to the proponent's adversary to explore any weaknesses in the testimony on cross-examination. Should the adversary fail to disclose any weaknesses in the basis for the expert's conclusions on cross-examination, the proponent of the evidence might then decide to put forth no further evidence only to find the trial judge or the court of appeals throws out any damages supported by the expert's testimony because the basis for the expert's conclusions were not fully disclosed.

This erroneous conclusion reached by the Fourth Circuit results from an inadequate understanding as to the proper method to be employed by trial judges in evaluating objections to expert testimony going to the reasonableness of an expert's conclusions. On this point, the confusion between and within the federal courts of appeals is at a crisis point.

Generally, courts of appeals take one of two different approaches with respect to admitting expert testimony. The first approach holds that questions as to the reasonableness of the basis for an expert's opinion are

questions going to the weight accorded to the evidence and not its admissibility. *Newell Puerto Rico, Ltd. v. Rubbermaid, Inc.*, 20 F.3d 15, 20-22 (1st Cir. 1994); *Petruzzi's IGA Supermarkets*, 998 F.2d at 1237-41; *United States v. L.E. Cooke Company, Inc.*, 991 F.2d 336, 342 (6th Cir. 1993); *Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1475-76 (5th Cir. 1993); *Orth v. Emerson Electric Co., White-Rogers Div.*, 980 F.2d 632, 636-37 (10th Cir. 1992); *Werth* v. *Makita Electric Works, Ltd.*, 950 F.2d 643, 654 (10th Cir. 1991); *Adams v. Sewell*, 946 F.2d 757, 768 (11th Cir. 1991); *Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1405-06 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 2306 (1994); *Christophersen v. Allied Signal Corp.*, 939 F.2d 1106, 1116-38 (5th Cir. 1991) (Clark concurring; Reavley, King, Johnson and Weiner dissenting), *cert. denied*, 112 S.Ct. 1280, 117 L.Ed. 506 (1982); *Coal Resources, Inc. v. Gulf & Western Industries*, 865 F.2d 761, 777-78 (6th Cir. 1989); *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 797 (7th Cir. 1989); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662-63 (11th Cir. 1988); *International Adhesive Coating Company, Inc. v. Bolton*, 851 F.2d at 540. These courts hold that merely because an expert's conclusion is speculative in nature does not mean that the testimony should be excluded. *Orth*, 980 F.2d at 637; *Firestone Tire and Rubber Co. v. Pearson*, 769 F.2d 1471, 1482-83 (10th Cir. 1985); *Jones*, 861 F.2d at 662; *Coal Resources, Inc*, 865 F.2d at 777-80 (Ryan, dissenting); *International Adhesive Coating Co.*, 851 F.2d at 545; *Mendes-Silva v. United States*, 980 F.2d 1482, 1485-89 (D.C. Cir. 1993); *Williams v. Jader Fuel Co.*, 944 F.2d at 1406.

The trial court's ruling with respect to the admissibility of McCoy's testimony is consistent with the

majority of the circuit courts and, in fact, consistent with the Fourth Circuit's prior rulings. The majority rule is stated in *Friendship Heights Associates v. Vlastimil Kovek*, 785 F.2d 1154 (4th Cir. 1986), which notes the *Advisory Committee Note*, Rule 705:

> . . . If a witness qualifies on any of the grounds listed in Rule 702, he should be allowed to testify as an expert. Should the witness later fail to adequately define or describe the relevant standard of care, opposing counsel is free to explore that weakness in the testimony. The trier of fact may then choose to discount the testimony.

785 F.2d at 1162.

This is consistent with the decisions in other circuits as cogently noted by the Tenth Circuit: "The combined effect of [Rules 703 and 705] is to place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination." *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980). The Fifth Circuit explains that "Rule 705 removes the need for the expert to make elaborate disclosures of the basis of his opinion, rather, the onus of eliciting the basis of the opinion is placed on the cross-examiner." *Bryan v. John Bean Division of FMC Corp.*, 566 F.2d 541, 545 (5th Cir. 1978).

The other approach in viewing objections to the reasonableness of expert conclusions is that taken by the Fourth Circuit in this case. This view holds that a trial judge, and in turn the appellate court, is required to carefully scrutinize the basis for an expert's conclusion as "a jury's common sense is less available than usual to

protect" the jury when it is faced with an opinion "conveying a delusive impression of exactness." *Tyger*, 29 F.3d at 145 (citations omitted); *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567-70 (D.C. Cir. 1993); *Renaud v. Martin Marietta Corp.*, 972 F.2d 304, 308-09 (10th Cir. 1992); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106-16 (5th Cir. 1991); *Coal Resources, Inc. v. Gulf & Western Industries, Inc.*, 865 F.2d 761, 770-71 (6th Cir. 1989). Under this view, the trial judge and the appellate court, not the jury, are required to examine not only the expert's testimony, but scour the entire record and weigh the evidence to determine if the expert's conclusions are adequately supported by the evidence. *See Joy*, 999 F.2d at 567-70; *Coal Resources*, 865 F.2d at 770-72.

This second approach conflicts sharply with the approach taken by the majority of the courts. It also "disregards the plain meaning of the rules, [and] builds a head wind favoring exclusion on a far broader basis than the rules permit." *Christophersen*, 939 F.2d at 1116 (Clark, concurring). Such a view changes the rules and denies a party the right to a jury trial. *Christophersen*, 939 F.2d at 1126-28 (Reavley, King, Johnson & Weiner, dissenting). Because the method chosen by some appellate courts, including the Fourth Circuit in this case, in reviewing the admissibility of expert testimony affects substantial rights of litigants, this issue is of considerable significance and should be clarified by this Court.

That there is confusion and sharp disagreement among and within the appellate courts on this significant issue is amply demonstrated by the Fifth Circuit's attempt to establish guidelines on the issue by considering it en banc in *Christophersen v. Allied-Signal Corp.*, 939

F.2d 1106 (5th Cir. 1991). The Fifth Circuit's attempt to shed light on the issue instead resulted in a divided court that issued three opinions. *Id.* The opinion of the court adopted the second, "close review of the evidence" test adopted by the Fourth Circuit in the present case. *Id.* Thus, both the Fourth and the Fifth Circuits now hold that deficiencies in the basis of an expert's conclusions do not go to the weight of the expert's testimony, but to its admissibility. *Id.* at 1114; *Tyger*, 29 F.3d at 143. The Fifth Circuit's adoption of this view, however, received sharp criticism from five judges. *Christophersen*, 939 F.2d at 1116-1138. Four of these judges believed that the plain meaning of the Federal Rules of Evidence allowed the trial judge to admit the testimony and that any deficiencies in the assumptions or basis for the expert's conclusions – rather than deficiencies in the expert's methodology – went to the weight of the evidence, not its admissibility. *Id.* (Reavley, King, Johnson & Weiner, dissenting). The fifth judge agreed with the dissenters that deficiencies in the basis of an expert's conclusion went to the weight of the evidence, but believed that the evidence was properly excluded under Rule 403. (Clark, concurring).

A panel of Sixth Circuit Judges also split on this issue in *Coal Resources, Inc. v. Gulf & Western Industries, Inc.*, 865 F.2d 761 (6th Cir. 1989). Two judges adopted the strict approach and weighed the evidence to determine that the expert's conclusions were deficient, and therefore inadmissible – much in the same way that the Fourth Circuit approached the present case. *Id.* at 771-72. The dissent in *Coal Resources*, however, criticized the court for performing such a review of the weight to be accorded the

expert's testimony. *Id.* at 777-78 (Ryan, dissenting). The dissenting judge stated that even though the expert's opinion was speculative, it should not be excluded when it had not been shown that the data relied upon by the expert was not the type reasonably relied upon by experts in the field. *Id.*

A conflict also exists within the Tenth and District of Columbia Circuits. *Compare Orth*, 980 F.2d at 636-37; *Werth*, 950 F.2d at 654; *Mendes-Silva*, 980 F.2d at 1485-87, *with Renaud*, 972 F.2d at 308-09; *Joy*, 999 F.2d at 567-70.

Thus, as seen by the Fifth, Sixth, Tenth and D.C. Circuits, there is not only a division between the courts of appeal as to the proper procedure in ruling on objections going to the reasonableness of expert testimony, but there is also division and confusion within the individual courts of appeal themselves as to this issue. This division would not require this Court's review in this case had the Fourth Circuit adopted the majority approach and held that the reasonableness of an expert's conclusion goes to the weight of the evidence. However, the Fourth Circuit is moving in the wrong direction as its opinion is contrary to expressions from this Court, is contrary to the plain meaning of the Federal Rules of Evidence, and impairs substantial rights of litigants. It is time for this Court to clarify this issue in order to prevent other courts from moving in the direction taken by the Fourth Circuit in this case.

2. The decision below conflicts with this Court's decisions in *Delaware v. Fernsterer*, 474 U.S. 15 (1985) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) and the majority of the courts of appeal by requiring the trial court to exclude the testimony of a qualified expert absent a disclosure of the underlying basis for the opinion.

By taking the strict approach noted above, the Fourth Circuit has departed from the Federal Rules of Evidence in a direction not sanctioned by this Court. In *Delaware v. Fernsterer*, 474 U.S. 15 (1985), this Court held that an expert's inability to recall the basis for his opinion did not offend a defendant's right to confrontation under the Constitution. In so doing this Court held that an expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility. 474 U.S. at 22. This Court also cited with approval the case of *United States v. Bastanipour*, 697 F.2d 170, 176-77 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983). *Bastanipour*, in turn, cited to Rules 703 and 705 in holding that an expert's failure to recall the test upon which his opinions were based and his lack of knowledge concerning the computer program by which the tests were performed went to the weight of the evidence, not its admissibility. 697 F.2d at 176-77. Thus although *Fernsterer* did not specifically interpret the Federal Rules of Evidence, the clear implication of the case is that deficiencies in an expert's testimony going to the reasonableness of an expert's conclusions goes to the weight of the evidence, not its admissibility. *See also Barefoot v. Estelle*, 463 U.S. 880, 888-906 (1983).

The holding in *Delaware v. Fernsterer* was complemented by this Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). In *Daubert* this Court noted that under the Federal Rules of Evidence all relevant evidence is admissible unless specifically excluded. This Court then went on to state that undue pessimism by courts about the capabilities of the jury system, and of the adversary system generally, did not justify resorting to common law rules requiring rigorous screening of relevant evidence. 113 S.Ct. at 2798. Rather, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* This Court also noted that the trial court is still free to direct a verdict or issue summary judgment should the evidence admitted be insufficient. The court also held that these conventional devices, rather than wholesale exclusion, are the appropriate safeguards for the admission of relevant but insubstantial evidence. *Id.* If this language in *Daubert* means anything, it is that the basis, or lack thereof, and reasonableness of an expert's opinion goes to the weight of the evidence, not its admissibility. *See Christophersen*, 939 F.2d at 1126-29 (Reavley, King, Johnson, and Wiener, dissenting). Again, this does not mean that the mere presentation of expert testimony creates a submissible case. Rather, such testimony may be given the weight it deserves and if this, with other evidence, is so insubstantial such that no reasonable jury could find for the party, a judgment as a matter of law may be issued.

While the *Daubert* decision does hold that a trial judge must determine by a preponderance of the evidence under Rule 104(a) "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue," the Court noted that this focus "must be solely on principles and methodology, not on the conclusions that they generate." 113 S.Ct. at 2796-97. The opinion of the Fourth Circuit panel does not concern the validity of McCoy's methods or of the cost data relied upon by McCoy, but the basis and reasonableness of his conclusions when viewed in light of what the Fourth Circuit considered to be conflicting evidence in the case. Rather than evaluating the expert's methods and the data utilized, the Fourth Circuit overturned the jury's verdict simply because the Fourth Circuit did not agree with the jury on the weight of the evidence. This Court's authorization of a preliminary review of the methodology of the expert does not permit a wholesale review of conflicting evidence by the courts to determine admissibility.

Admittedly, the decision in *Daubert* states only sketchy abstract observations about the application of the federal rules to the admission of scientific testimony. *Daubert*, 113 S.Ct. 2799-2800 (Rehnquist, C.J. and Stevens, J., concurring in part and dissenting in part). The *Daubert* decision leaves many questions unanswered. *Id.* Unfortunately, the courts of appeal have varied widely and without adequate discussion in deciding many of these unresolved questions. This wide variation often results in litigation being determined not by the merits of the case, but by the luck of the draw as to which appellate court,

and in some instances which panel of judges, will be deciding the appeal. Because substantial rights are at stake, litigants should not be forced to have their disputes determined by the luck of the draw.

3. **The decision below has so far departed from the accepted and usual course of proceedings and thereby violated the Seventh Amendment's guarantee of trial by jury:**

   a. **by weighing the entire record and determining that the trial judge abused her discretion in allowing a qualified expert to give relevant testimony when the underlying facts and data were never questioned and**

   b. **in vacating the jury's award of damages without finding that there was no reasonable basis for the jury's verdict.**

Clarification is so desperately needed from this Court on the issues raised because the issues involve fundamental rights of litigants. Under the methodology employed by the Fourth Circuit in this case, the Fourth Circuit has reweighed the evidence and overturned the jury's verdict without adhering to the long established standards in reviewing a jury's verdict. The Fourth Circuit's failure to adhere to the long established standards of review in deciding issues concerning the sufficiency of evidence has allowed the Fourth Circuit to usurp the traditional functions of both the jury and the trial judge and has thereby violated the Seventh Amendment's guarantee of a trial by jury.

The traditional standards for overturning a jury's verdict because of the weight of the evidence are well

established in the federal rules and federal practice. In order for a party to be entitled to a judgment as a matter of law the trial court must determine that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50. In making this determination, the court is not free to weight the evidence, to pass on the credibility of witnesses, or to substitute its judgment of the facts for that of the jury. Wright & Miller, *Federal Practice and Procedure: Civil* § 2524. Rather, only if the evidence and all reasonable inferences to be drawn therefrom, viewed in the light most favorable to the nonmoving party, points solely in the favor of the moving party may a court render a judgment as a matter of law. *E.g., Orth v. Emerson Electric Company, White-Rogers Div.*, 980 F.2d 632, 635 (10th Cir. 1992). Additionally, when reviewing the exercise of a trial judge's discretion in denying relevancy objections, the appellate court will "only rarely, and in extraordinarily compelling circumstances . . . , from the vista of a cold appellate record, reverse a district court's judgment concerning the weighing of probative value and unfair effect." *See, e.g., Newell Puerto Rico, Ltd. v. Rubbermaid, Inc.*, 20 F.3d 15, 21 (1st Cir. 1994). The purpose for such standards is to protect against the encroachment by the courts on the rights of litigants to have issues of fact determined by a jury. E.g., see, *Granberry v. O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988); *Jeanes v. Milner*, 428 F.2d 598, 602 (8th Cir. 1970).

These standards are not followed by the Fourth Circuit and by other courts that review the reasonableness of an expert's opinion under the guise of determining admissibility. These courts require the trial judge to

review and weigh all of the evidence in the case to determine if the expert's conclusion is reasonable. They also require a trial court to consider negative inferences raised by an expert's failure to testify as to the basis for the conclusions reached, even though the rules of evidence do not require such a disclosure. After weighing all of the evidence, if the court believes that the expert's conclusions are not supported by the weight of the evidence, the expert's opinion is excluded. Because the expert's opinion is often necessary to establish causation or the quantum of damages, the exclusion of the expert testimony is fatal to the litigant's case. Thus, in effect, whenever expert testimony is necessary to establish a litigant's case, these decisions allow a court to render a judgment as a matter of law upon its own determination as to the weight of the evidence.

These minority decisions further hold that not only are the trial courts required to weigh the evidence, but so too are the appellate courts. Thus, under this view a litigant is entitled to submit an issue requiring expert testimony to the jury only if both the trial court and the appellate court believe that the weight of the evidence supports the expert's conclusions. Such a review and weighing of the entire record not only violates the Federal Rules of Evidence but is impermissible under the Constitution as it infringes on the right to a trial by jury. U.S. Const., Amend. VII; *Granberry*, 866 F.2d at 112; *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165, 1168 (5th Cir. 1986).

Clearly, the Fourth Circuit did not follow the established guidelines so as to not infringe on the Seventh

Amendment. There is not one word in the Fourth Circuit's opinion about the appropriate standard of review in evaluating a denial of a motion for judgment as a matter of law or any findings that there was no legally sufficient evidentiary basis for a reasonable jury to find in Pensacola's favor. Instead, the court looked at all of the evidence in the case on the issues of causation and damages and concluded that it disagreed with the jury's decision that the expert's conclusions were reasonable and entitled to consideration. The court did this even though

a) the expert's opinions and conclusions were supported by the evidence;

b) Tyger did not challenge the information upon which the expert derived the cost figures and did not attempt to elicit the substantive basis for the expert's opinions,

c) the trial court did not find that the expert's methodology was faulty, and

d) Tyger did not significantly probe or rebut the basis for the expert's conclusions.

Does not a court by reviewing and weighing the evidence infringe upon the right to have a jury determine such issues of fact? Is it not the jury's function, guaranteed under the Seventh Amendment to the United States Constitution and established federal practice, to weigh conflicting testimony and determine the credibility of witnesses? These important rights are violated by the Fourth Circuit, and by other courts of appeal, when they

review and weigh the evidence to determine the credibility of expert testimony in deciding whether to exclude or admit such testimony. Decisions from the Fourth, *Tyger*, 29 F.3d at 145; Fifth, *Christophersen*, 939 F.2d at 1106; Sixth, *Coal Resources, Inc.*, 865 F.2d at 761; Tenth, *Renaud*, 972 F.2d at 304; and District of Columbia, *Joy*, 999 F.2d at 549, Circuits have erroneously ruled in this manner. The impact of Rule 705 and the decisions of the majority of the Circuits is clear. If the underlying facts for an expert opinion are not given on direct examination and are not developed during cross-examination, the testimony must be admitted. The failure of counsel for Tyger to attack Mr. McCoy's underlying support on cross-examination does not allow the Fourth Circuit, as it did, to usurp the jury's function by scouring the record for whatever conflicting testimony can be found and then weighing all of this against the expert opinion. Unless this Court grants this writ, such procedures will continue. With this Court's recent rejection of the *Frye* test in *Daubert*, the time is now ripe to clarify the *procedure* of determining the admissibility of expert testimony.

CONCLUSION

There is substantial controversy between and within the federal courts of appeal as to the proper procedure in admitting expert testimony. Although the federal rules of evidence allow the admission of expert testimony without the disclosure of the basis for that testimony, a few courts have held expert testimony inadmissible absent disclosure of the basis for the expert's conclusions. These

courts hold that the reasonableness of the expert's conclusions go to the admissibility of the expert's conclusions, rather than merely its weight. Such opinions are contrary to the majority of opinions in the federal courts of appeal and to the opinions of this Court, and have the effect of depriving litigants of the right to have issues of fact determined by a jury. The Court's guidance on these issues is required due both to the substantial amount of litigation affected by these issues, and to important Constitutional rights at stake. Therefore, granting a writ of certiorari to review the opinion of the Fourth Circuit is appropriate and necessary.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually and for the use and benefit of Tyger-Pensacola Joint Venture, *Plaintiff-Appellant,* v. PENSACOLA CONSTRUCTION COMPANY, a Delaware Corporation, *Defendant-Appellee.*	No. 92-2502

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually and for the use and benefit of Tyger-Pensacola Joint Venture, *Plaintiff-Appellant,* v. PENSACOLA CONSTRUCTION COMPANY, a Delaware Corporation, *Defendant-Appellee.*	No. 92-2503

Appeals from the United States District
Court for the Eastern District
of Virginia, at Newport News.
Rebecca B. Smith, District Judge;
Richard B. Kellam, Senior
District Judge.
(CA-88-185-NN)

Argued: May 11, 1994

Decided: July 8, 1994

Before WILKINS, Circuit Judge, and SPROUSE and CHAPMAN, Senior Circuit Judges.

Reversed and remanded with instructions by published opinion. Senior Judge Chapman wrote the opinion, in which Judge Wilkins and Senior Judge Sprouse joined.

COUNSEL

ARGUED: Samuel W. Hixon, III, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, Richmond, Virginia for Appellant. Richard W. Miller, MILLER LAW FIRM, P.C., Kansas City, Missouri, for Appellee. **ON BRIEF:** William R. Mauck, Jr., WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, Richmond, Virginia, for Appellant. Weston A. Sechtem, MILLER LAW FIRM, P.C., Kansas City, Missouri, for Appellee.

OPINION

CHAPMAN, Senior Circuit Judge:

The parties to this action formed a joint venture in 1985, its primary purpose being the construction of bridge supports in the James River. When the cost of the project grossly exceeded initial estimates, Tyger Construction Co., Inc. ("Tyger") filed suit against Pensacola Construction Co. ("Pensacola") alleging breach of contract by Pensacola's failure to make capital contributions to the venture as required by their joint venture agreement. Pensacola filed a counterclaim, alleging, *inter alia*, that Tyger misrepresented to Pensacola that a source of sand for the project was available and the required permits had been obtained to mine the sand. A jury awarded Pensacola $5.6 million on its misrepresentation claim, but the district court granted Tyger's motion for a new trial. After a second trial, the jury again returned a verdict for Pensacola in the amount of $1,578,250. We address Tyger's argument that Pensacola's expert witness's testimony had no factual basis and was too speculative to support a portion of the jury's verdict. We agree and vacate that portion of the verdict based upon this testimony.

I.

Tyger and Pensacola formed a joint venture known as Tyger-Pensacola and entered into a written joint venture agreement on August 15, 1985. The joint venture was awarded a contract by the Virginia Department of Highways and Transportation (VDOT) to construct, among other things, two sand islands in the James River at

Newport News, Virginia as part of a bridge tunnel for Interstate 664. Under the agreement, Tyger assumed a 60% interest in the venture and was responsible for the day to day activities. Pensacola assumed the remaining 40% interest, and each party was to contribute its pro rata share of capital to the venture.

Meetings were held by the parties during the summer of 1985 to estimate the costs of performing the project and submitting a bid. The parties had differing opinions as to the source of sand; Pensacola felt that Great Lakes Dredging Company ("Great Lakes") should be used, but Tyger believed a cheaper source could be found.

On July 21, 1985, Paul Silvestri, the vice-president of engineering for Tyger, received several quotations from Lone Star Cement Company ("Lone Star"), a local sand supplier. These quotes were provided by Dick Lynch, a Lone Star representative, and were for allotments of sand from four pieces of property, one of which was the Waitman tract.

On July 22, Lynch met with Silvestri and provided a revised quotation on the Waitman tract, offering sand from that property at 50 cents per ton. Lynch told Silvestri that he could obtain the necessary permits, but he warned that the Waitman source was not yet finalized.

The final bid to the VDOT was due July 23, 1985. In anticipation of this date, the parties met on July 22, and discussed, among other things, the source of sand. Silvestri was the sole Tyger representative at the meeting, and he relayed the information provided to him by Lone Star. Silvestri testified that he told Pensacola that there

was not a problem with obtaining permits, which was confirmed by two of Pensacola's witnesses. However, Ronald J. Capoccia, a Pensacola representative present at the meeting, testified that Silvestri stated that the Waitman tract was secure and all necessary permits had been obtained. J.A., Vol. V, 1540-41. Tyger claims that Silvestri never told Pensacola that the permits were in hand.

The Lone Star figure was used in the final bid, and the joint venture was awarded the contract. Subsequently, Lone Star could not deliver the Waitman tract as the source of sand, and the joint venture was required to seek other sand, which proved more expensive. Until a source of sand could be secured for mining, approximately 500,000 cubic yards of sand were provided by Great Lakes between February 27 and March 27, 1986. The joint venture began mining sand at Eppes Island in April 1986 and continued until late summer 1987.[1] Eppes Island provided the project with 1.25 million cubic yards of sand but could not satisfy the project's entire demand. Another source was located at "Hula/Chisman," approximately 25 miles downstream from Eppes Island, from which the venture removed the final 267,000 cubic yards necessary for completion of the project.

Tyger filed suit against Pensacola in December of 1988, alleging breach of contract and seeking capital contributions that Pensacola allegedly failed to make as required by the parties' agreement. Pensacola filed a counterclaim and Tyger moved for summary judgment.

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[1] Shirley Hole, referred to occasionally in conjunction with Eppes Island, was the load-out facility used when the Eppes Island pit was being mined.

The court granted Tyger's summary judgment motion in the amount of $2,790,000, which judgment was affirmed on appeal by an unpublished opinion of February 22, 1991. (No. 89-2433). The court also dismissed 48 of 51 allegations in the counterclaim alleging misrepresentation and breach of fiduciary duty. Eventually, only one allegation was tried: whether Paul Silvestri misrepresented to Pensacola that Tyger had secured a source of sand and had obtained all necessary permits. The jury returned a verdict of $5.6 million on this claim.

Tyger moved for a new trial, which the court granted, on the ground that the verdict was not supported by the evidence. The district court noted that Pensacola had the burden of establishing a causal connection between any damages claimed and the misrepresentation. The court concluded that Pensacola had not met its burden because the failure to secure the Waitman tract never resulted in a lack of sand, and other problems, particularly with the barges, which carried the sand, and other equipment failure, were the cause for delays in the sand operation. Specifically the court found:

> The [time delay] expenses were never casually (sic) related to the failure of the Waitman tract and, therefore, should not have been considered by the jury in assessing damages. The costs associated with the barges and the two month extension of the project relate to the delay in completing the sand operation. The Court refused to instruct the jury on the subject of delay related damages because it was unchallenged that the Joint Venture was never without a sufficient source of sand. Therefore, the failure to secure the Waitman tract could not

> be the proximate cause of any expenses incurred as a result of delay in the project. In fact, the issue of delay was never presented to the jury.

J.A., Vol. IV, 1235.

At the second trial, Pensacola attempted to prove that the joint venture incurred additional costs of $9,799,474 as a result of the unavailability of the Waitman tract. Pensacola sought to recover 40% of this amount or $3,919,790, representing its 40% interest in the joint venture. At trial, Pensacola used the testimony of its President, Henry B. McCoy, Jr., as an expert in the areas of construction methods and assessment of cost overruns.[2] At his deposition prior to trial, McCoy gave his opinion as to the amount of damages caused by the failure to secure the Waitman tract. Shortly after this deposition and prior to trial, Tyger filed a motion in limine, arguing that McCoy's calculations and damages assessment had no basis in fact. The district court made the following comments in denying the motion:

> In terms of the fact basis, as a general matter, I'm of the opinion that Rule 705 will allow an expert, once they are qualified – and I think that is a threshold area for any expert – once an expert qualifies in a particular field, I think that the Court and the jury can consider any opinion that the expert renders. I believe that if an

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[2] The court later qualified McCoy as an expert in the following areas: "in assessing costs, expenses, and losses in projects such as the one in issue in this lawsuit and the preparation of estimates and the review of cost accounting reports, and in the analysis of construction methods for projects such as at issue in this lawsuit." J.A., Vol. VI, 1795.

> expert doesn't have an adequate fact basis for that opinion, that is a matter to be brought out on cross-examination.
>
> That is your role as an advocate, and then it is your role as an advocate to argue to a jury that this opinion is not properly based in fact, it should not be given much weight by the jury, if any at all. And I think that basically where you say that there are fallacies in the analysis and fallacies in the reasoning process and in the bases, that those are matters for cross-examination and argument. I make that a general ruling in regard to what you said.

J.A., Vol. IV, 1372.

McCoy testified about damages in several categories, four of which are relevant to this appeal: (1) increased costs of mining an uneconomical sand pit, (2) increased costs due to excessive time, (3) excess supervisor salaries at the pits and (4) excess DBE (Disadvantaged Business Enterprise) fee paid for the move to the Hula/Chisman pit. Counsel for Pensacola explained to the trial judge the relationship of the first two categories:

> The number that you are talking about, . . . [uneconomical sand pit calculation], is inefficiency of mining, hauling, and loading sand. That is an operation that takes place at the pit, in the load-out facility, the Shirley hole that we have been talking about.
>
> Those inefficiencies, because the production there is less than it would have been at Waitman, consequently cause production downstream to be slower. It also causes time to be extended on those operations. That is essentially

> the job extension costs that are accumulated in the $4 million dollar figure.

J.A., Vol. V, 1726-27.

For his calculation of damages, McCoy relied on numerous documents, including: the work sheet of Ken Chambless, Pensacola's cost accountant for the project, on the amount of the project cost for each month it overran, cost reports known as 650 reports, sand inventory from the Shirley pit and Eppes Island and Hula/Chisman, the original sand estimate for the Waitman pit, daily reports, summary production reports, etc. J.A., Vol. VI, 1780.[3]

First McCoy testified that the pit maintenance at Eppes Island was uneconomical because

> we had mined the economical sand out of [the Eppes] mine. We had no other place to go to. Therefore we had to widen out the pit, we had to go deeper, which required more dewatering, wetter sand to handle and haul. We were hauling water instead of sand. We had to rehandle the material by digging deeper. The haul roads would be steeper coming out of the pit. In my opinion, those are some of the items that would cause the cost to increase drastically.

J.A. 1820. McCoy found the final cost of mining at the Eppes pit to be $4.32 per cubic yard. He estimated that a mining operation at Waitman would have cost $2.11 per yard, based on the costs incurred at Hula/Chisman. Actually, the Hula/Chisman operation cost $3.29 per cubic yard of sand ($879,059 total costs/ 267,108 total

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[3] All citations to McCoy's testimony may be found in Volume VI of the joint appendix.

cubic yard mined). McCoy then lowered the Hula/Chisman figure from $3.29 to $2.11 by employing a "learning curve."[4] Finally, he took the difference between $4.32 and $2.11, or $2.21 and multiplied that by 1,503,000 (the total amount of sand mined from the Eppes Island pit and the Hula/Chisman pit) to obtain $3,043,000. This figure he testified was the cost of mining an uneconomical pit.[5]

Second, McCoy tried to establish the costs of the time delay associated with the mining of the Eppes and Hula/Chisman pits. He used his earlier figures, this time dividing $2.11 by $4.32, to reach what he referred to as an efficiency factor of 48.96%. He then multiplied this efficiency factor by twelve months (August 1986 to September 1987, the amount of time required to mine and place sand) to get 5.88 months, which represented the time he considered to be excess. Next, he multiplied 5.88 months by $754,897 (his revised cost of the sand operation per month) to get $4,438,794, which he testified was the job extension costs attributable to the fact that the Waitman property was not available.[6]

On cross examination, McCoy reiterated that Eppes Island was mined at considerable additional costs due to rehandling material, extra dewatering, and additional

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[4] The learning curve is based on an assumption that the $3.29 cost per cubic yard of sand at Hula/Chisman would have been reduced to $2.11 had 700,000 cubic yards being mined.

[5] McCoy's testimony concerning the uneconomical pit calculation can be found in the joint appendix, pp. 1828-30.

[6] McCoy's testimony as to excessive time can be found in the joint appendix, pp. 1830-33.

reclamation. However, he admitted that he was not prepared to testify as to any specific reclamation costs associated with the Eppes Island mine. J.A. 1853. When requested to specify the difference between the cost of dewatering the Eppes Island mine and the cost to do the same at Hula/Chisman, McCoy responded that he could not. J.A. 1856. Likewise, when McCoy was asked if he could point to any specific costs associated with how much more it would cost to handle material at Eppes Island than projected at Waitman, McCoy responded, "No, it was from the 650 report that these figures were obtained." J.A. 1856-57.

McCoy conceded that the stockpile of sand at Shirley Hole was never depleted and there was always a good stockpile of sand available from April 1986 to the completion of the project.

Russ Rogers, the joint venture's sand superintendent, testified that the stockpile of mined sand from the Eppes pit was never depleted. J.A., Vol. VI, 2066-67. Rogers also testified that there was never a demand for sand downriver that the operation could not meet. J.A. 2069. Rogers further attributed any delay in the sand operation to equipment failure, particularly at the load out facility at the Shirley pit. J.A. 2069. John Johnson, the joint venture's project manager, testified that "[t]here was always sand available to be loaded out." J.A., Vol. VI, 2106. Later, he reiterated, "[t]here was always sand available when we needed it at the job. . . . " J.A. 2106. Johnson attributed delay in the operation to transportation problems, and not to the unavailability of sand. J.A. 2115. However, Johnson did testify that the Eppes mine was more expensive to mine because water had to be pumped from the

mine and that the sand from the Eppes mine presented maintenance problems because of its moisture content. J.A. 2119, 2124.

As to the excess supervisor salaries and the excess DBE fee, Pensacola offered no testimony in support of these damage claims. The only reference to these claims was Pensacola's trial exhibit 138, which listed these damages along with corresponding accounting records. The exhibit reads as follows:

> *Account*
> 620-2800 &
> 968-1001 – These are salaries paid to Tyger-Pensacola supervisor personnel in the sand pit operation.
> $380,433.
> Excess paid $380,433 x 48.96% = 186,260.
>
> 620-2700 – DBE fee decreased by 2½% of the excess costs.
> See Sheet G.[7] = 63,297

J.A., Vol. VIII, 2567.

The jury awarded Pensacola $1,578,250 or 40% of $3,945,627. Of the $3,945,627, the jury found on a special interrogatories verdict form $1,268,448 for the increased costs of mining an uneconomical sand pit, $1,270,122 for increased costs due to excessive time, $90,543 for excess

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[7] Sheet G contains Pensacola's assessment of the overcharges associated with the use of the Eppes Island pit and the Hula/Chisman pit. The overcharges, a total of $2,531,864, were then multiplied by 2½%, or the percentage that the DBE was paid for his work to get $63,297. Implicit in this calculation is the assumption that the failure to secure the Waitman pit caused the overcharges. J.A., Vol. VIII, 2594.

supervisor salaries at the sand pit, and $38,866 for excess DBE fee paid for the move to Hula/Chisman.[8]

Pensacola's action for an accounting of the joint venture, Count III of its amended counterclaim, proceeded before a United States Magistrate Judge, who issued a report and recommendation in August 1992. The district court affirmed this report and entered a final order and judgment in favor of Tyger in the amount of $21,057.

Tyger and Pensacola have raised several issues on appeal concerning the two trials and the final accounting. We find it necessary to address only one: whether McCoy's testimony had any basis in fact.

II.

Under Rule 703 of the Federal Rules of Evidence, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." Rule 705 allows an expert to testify "in terms of opinion or inference and give reasons thereof without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

An expert's opinion should be excluded when it is based on assumptions which are speculative and are not

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[8] The jury also found other damages representing additional barge costs, costs of the move to Hula/Chisman and costs due to subcontracting with Great Lakes, which total $1,277,698, and have not been appealed.

supported by the record. *See Eastern Auto Distribs., Inc. v. Peugeot Motors of Am.*, 795 F.2d 329, 337 (4th Cir. 1986). An expert's opinion as to damages must be causally related to the alleged harm. *See Nat Harrison Assocs., Inc. v. Gulf State Utils., Co.*, 491 F.2d 578, 588 n.3 (5th Cir. 1974).

This court reviews a district court's ruling admitting expert testimony for an abuse of discretion. *Persinger v. Norfolk & W. Ry.*, 920 F.2d 1185, 1187 (4th Cir. 1990).

A.

Tyger argues that McCoy's testimony about increased costs caused by time delays associated with a lack of sand is unsupported by the evidence and the district court abused its discretion in admitting it. We agree.

Pensacola had to demonstrate that Tyger's failure to produce the Waitman tract caused the project to experience delay. Pensacola has argued that a lack of sand caused delay. However, McCoy admitted that during the twelve month time period used in his excessive time calculation the sand stockpile was never depleted. His admission was corroborated by two of Tyger's witnesses, Russ Rogers and John Johnson, who both had daily contact with the sand operation. Furthermore, both Rogers and Johnson attributed any delay in the sand operation to equipment failure and logistical problems with the barge system. Pensacola has pointed to the testimony of Paul Silvestri, Tyger President Jonathan Goodier, and Ken Chambless, as confirmation that a lack of sand was delaying the job. Silvestri's cited testimony, however, is directed to the urgency of finding a sand source during the initial stage of the project and does not address the

adequacy of the sand stockpile at the Eppes pit during the time period used by McCoy in his analysis. Goodier's and Chambless's testimony speak more to cost overruns in the sand operation, rather than a lack of a sand stockpile at the Eppes pit.

The evidence is uncontradicted that a sand stockpile existed during the twelve month time period that McCoy used in his calculation, and that the sand operation was delayed for reasons other than Tyger's failure to produce the Waitman tract. Therefore, McCoy's excessive time calculation was based on a faulty assumption that is unsupported by the evidence.

It was an abuse of discretion for the trial court to admit McCoy's testimony that the delays in construction were caused by a lack of, or inefficiencies in the production of, sand. This error resulted from the trial judge's belief, expressed at the time it denied the motion in limine as to McCoy's testimony, that the question of whether an expert's opinion had an adequate basis in fact should be handled by opposing counsel through cross examination and in jury argument. The court may not abdicate its responsibility to ensure that only properly admitted evidence is considered by the jury. Expert opinion evidence based on assumptions not supported by the record should be excluded. *See Eastern Auto Distribs., Inc.*, 795 F.2d at 337. Excluding McCoy's excessive time calculation, there remains no evidence establishing a causal connection between Tyger's failure to secure the Waitman tract and any costs associated with excessive time. Therefore, we vacate the jury's award of $1,270,122.

B.

We next consider McCoy's testimony as to excessive costs associated with mining an uneconomical pit. As noted above, McCoy testified that the Eppes pit was uneconomical to mine because of rehandling, dewatering and reclamation. However, on cross examination, McCoy admitted that he could not quantify costs attributable to any of these factors.[9] Although John Johnson, the project manager, testified that the Eppes pit was under water and added expenses were incurred due to this fact, McCoy himself never causally linked the rehandling, dewatering and reclamation to his damages calculation for mining an uneconomical pit.

We do know that McCoy used his calculations to quantify damages of $3,043,000. To arrive at this figure, McCoy used $4.32 as the cost of each cubic yard of sand mined from Eppes. Under an assumption that Hula/Chisman and Waitman were similar pits, McCoy used $3.29 as the cost of sand per cubic yard for Hula/Chisman, but later reduced this figure to $2.11 using his "learning curve."

First, the Hula/Chisman figure was used by McCoy because, in his judgment, Hula/Chisman was a comparable pit to Waitman. We find in the record no basis for this

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[9] In fact, in his deposition, McCoy, when asked why the Eppes pit was more expensive than Waitman would have been, responded: "It was an uneconomical pit to mine; it could have been a lot of different things. Digging deeper you probably would have had more water, they could have rehandled more material. I was not at the job site every day, so I do not know exactly every day-to-day operation."

conclusion. There is no analysis, either in McCoy's testimony or elsewhere, of the similarities shared by the Waitman pit and the Hula/Chisman pit. In fact, on cross-examination, McCoy admitted that different equipment was used at Hula/Chisman than what was contemplated for Waitman, the haul roads were different in length, and the time spent mining the two pits would have been different. Therefore, his conclusory statement that Hula/Chisman and Waitman were similar mines is without factual support in the record and should have been excluded by the district court.

Second, Tyger has argued that McCoy's use of the "learning curve" has no basis in the record. Tyger points to McCoy's deposition testimony that the concept of the learning curve was thought up "one night on his own." It is also apparent from McCoy's testimony that he reached the $2.11 figure by assuming that the cost to mine Hula/Chisman ($3.29 per cubic yard) would have been decreased by $1.18 per cubic yard had a total of 700,000 cubic yards been mined at Hula/Chisman.

Pensacola has directed our attention to *Clinchfield R.R. v. Lynch*, 784 F.2d 545 (4th Cir. 1986), which merits our consideration at this juncture. In *Lynch*, we affirmed the district court's discretionary admittance of an expert's opinion concerning personal property assessments. Although the expert admitted that, to his knowledge, he was the only economist to employ certain data in an analysis of personal property assessments, we noted that "[a] court should not exclude expert testimony simply because it involves a new method or novel theory." *Id.* at 554. "Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or

likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation." *Id.* (quoting *United States v. Baller,* 519 F.2d 463, 466 94th Cir.), *cert. denied,* 423 U.S. 1019 (1975)).

We find *Lynch* and the matter at hand distinguishable. In *Lynch,* an expert based his opinion testimony on facts and data from the United States Bureau of Census. This was appropriate under Rule 703 which permits an expert to base his opinion on facts which need not be admissible in evidence, "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." However, in *Lynch* it was the expert's *method* which was novel and was at issue on appeal. Here, we have an expert espousing an opinion based on assumptions which find no support in the record. Although McCoy's methods are unusual, the greater danger is that the jury may accept as fact not just the fault assumptions on which he relied, but may also accept the conclusions that are drawn through his use of these assumptions. When the assumptions made by an expert are not based on fact, the expert's testimony is likely to mislead a jury, and should be excluded by the district court. Without some basis in fact for McCoy's uneconomical pit calculation, we find that the district court abused its discretion in allowing this line of speculative testimony. Although John Johnson, the joint venture's project manager, testified that water content caused problems at Eppes Island, Pensacola made no demonstration that water would not have caused similar problems at Waitman. Because there is no further evidence which

would establish a causative link between the allegation that Eppes was an uneconomical pit compared to Waitman and the damages incurred due to the mining of the uneconomical pit, we now vacate the jury's award of $1,268,448 for the increased costs of mining an uneconomical pit.

C.

Turning now to the "excess supervisor salaries" calculation, we find for many of the same reasons stated above that this calculation is unsupported by the factual record and should have been removed from the jury's purview. One of the components of the calculation is the 48.96% efficiency figure that we found earlier to be based on illogical assumptions. The calculation also assumes that the use of the Eppes and Hula/Chisman pits caused time delays in the sand operation. As noted above, there is no causal connection between the use of the Eppes and Hula/Chisman pits and any cost overrun due to alleged delays in the sand operation; therefore there can be no connection between excess supervisor fees and the excess costs incurred through delay.

The "excess DBE fee" calculation fails for the same reason. In his calculation, McCoy pulled 18 separate accounts and applied an overcharge factor of either 48.96% or 100% to each account in determining that there was a total overcharge of $2,531,864. Again, the 48.96% efficiency factor is based on unsupported assumptions, and McCoy's overcharge calculation mistakenly assumes that the use of the Eppes and Hula/Chisman pits directly caused the cost overrun in the sand operation. We find

the excess supervisor salaries and the excess DBE fee calculations both to be without factual support and therefore speculative in nature. The district court abused its discretion in not removing these calculations from the jury's consideration. We vacate the jury's verdict as to these two items.

III.

"Scrutiny of expert testimony is especially proper where it consists of 'an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it.' " *Eastern Auto Distribs., Inc. v. Peugeot Motors of Am.*, 795 F.2d 329, 338 (4th Cir. 1986) (quoting *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962)). This is particularly true, in a situation such as this, when an expert has apparently taken factual data from the specific project in dispute, and formulated estimates of damages. Without accurate factual support, the damages calculations were speculative and the district court abused its discretion in allowing McCoy's testimony in the areas discussed above. We find the remaining issues presented by the parties to be without merit.

Accordingly, the jury's awards of $1,270,122 for increased costs due to excessive time, $1,268,448 for increased costs of mining an uneconomical sand pit, $90,543 for excess supervisor salaries at the pits, and $38,866 for excess DBE fee paid for the move to the Hula/

Chisman pit must be vacated. The remainder of the verdict, $511,059.20 or 40% of $1,277,698, which was not appealed, will stand.

REVERSED AND REMANDED WITH INSTRUCTIONS TO VACATE THOSE PORTIONS OF THE VERDICT SET FORTH ABOVE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 9, 1994

No. 92-2502
CA-88-185-NN
Tyger Construction v. Pensacola Constr Co

No. 92-2503
CA-88-185-NN
Tyger Construction v. Pensacola Constr Co

MANDATE

The Judgment of this Court dated 7/8/94 takes effect today.

BERT M. MONTAGUE
CLERK

FILED: August 8, 1994

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-2502
No. 92-2503
(CA-88-185-NN)

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually and for the use and benefit of Tyger-Pensacola Joint Venture,

Plaintiff - Appellant,

versus

PENSACOLA CONSTRUCTION COMPANY, a Delaware Corporation,

Defendant - Appellee.

ORDER

Appellant has filed a bill of costs. This case was reversed and remanded with instructions by published opinion on July 8, 1994.

The Court awards appellant $7,648 in costs.

For the Court – By Direction

/s/ Bert M. Montague
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
December 2, 1992

No. 92-2502
CA-88-185-NN

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually and for the use and benefit of Tyger-Pensacola Joint Venture

Plaintiff - Appellant

v.

PENSACOLA CONSTRUCTION COMPANY, a Delaware Corporation

Defendant - Appellee

No. 92-2503
CA-88-185-NN

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually and for the use and benefit of Tyger-Pensacola Joint Venture

Plaintiff - Appellee

v.

PENSACOLA CONSTRUCTION COMPANY, a Delaware Corporation

Defendant - Appellant

ORDER

The Court consolidates these cases for purposes of briefing and oral argument and directs that:

1. Tyger Construction is designated the appellant pursuant to Local Rule 28 for purposes of briefing, preparation of the joint appendix, and oral argument;
2. one joint brief shall be permitted per side;
3. the parties on each side shall share the time allowed for oral argument;
4. each side shall notify the Court of the attorney designated as lead counsel within ten days of the date of this order.

For the Court – By Direction

/s/ Bert M. Montague
CLERK

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

TYGER CONSTRUCTION CO., INC., ETC.,

Plaintiff,

v.

PENSACOLA CONSTRUCTION CO.,

Defendant.

CIVIL ACTION
NO. 88-185-NN

(Filed
April 16, 1992)

ORDER

A telephone conference call was held this date on Tyger Construction Co., Inc.'s Motion to Exclude Certain Accounting Challenges. Samuel Hixson, Esq. and William R. Mauck, Jr., Esq. represented Tyger Construction Co., Inc. Stephan F. Andrews, Esq. and Richard W. Miller, Esq. represented Pensacola Construction Co. The hearing was recorded by Official Court Reporter Horace Weiss.

The Court denied Tyger Construction Co., Inc.'s Motion to Exclude Certain Accounting Challenges. The Court required Tyger to address all of the accounting issues remaining in this case as set forth in Pensacola's Additional Factual Responses by Pensacola to Its Accounting Challenges. The Court's reasons for this ruling are contained in the record of the hearing.

The Clerk is DIRECTED to send a copy of this Order to counsel of record.

/s/ Tommy E. Miller
UNITED STATES MAGISTRATE JUDGE
SPECIAL MASTER

Norfolk, Virginia
April 15, 1992

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

Newport News Division

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually and for the use and benefit of Tyger-Pensacola Joint Venture

v.

PENSACOLA CONSTRUCTION CO., a Delaware Corporation

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C.A. 88-185-NN

(Filed April 16, 1991)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came on for determination by the Court. The issues have been considered and a decision has been rendered by the Honorable Richard B. Kellam.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Tyger Construction Company Incorporated and against Fidelity and Deposit Company of Maryland in the amount of $2,790,000, plus accrued interest,

as provided in the judgment entered in this action on June 30, 1989.

April 15, 1991	DORIS R. CASEY, Clerk
Date	*Clerk*
cc: William R. Mauck, Jr., Esq.	/s/ Paula M. Lankford
Stephen F. Andrews, Esq.	Paula M. Lankford
Roy Bash, Esq.	*(By) Deputy Clerk*
o.b.	

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2433

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually, and for the use and benefit of Tyger-Pensacola Joint Venture,

Plaintiff – Appellee,

versus

PENSACOLA CONSTRUCTION CO., a Delaware Corporation,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Richard B. Kellam, Senior District Judge. (CA-88-185-NN)

Argued: January 10, 1991 Decided: February 22, 1991

Before SPROUSE, CHAPMAN, and WILKINS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Richard W. Miller, MILLER, BASH AND STARRETT, P.C., Kansas City, Missouri, for Appellant. Samuel Walter Hixon, III, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, Richmond, Virginia, for Appellee. **ON**

BRIEF: Roy Bash, Scott A. Long, MILLER, BASH AND STARRETT, P.C., Kansas City, Missouri, for Appellant. William R. Mauck, Jr., WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Plaintiff-appellee Tyger Construction Company, Inc. ("Tyger") instituted this breach of contract action on December 12, 1988 in the United States District Court for the Eastern District of Virginia against defendant-appellant Pensacola Construction Co. ("Pensacola"). The complaint alleged that Pensacola had breached the joint venture agreement ("the Agreement") between the parties by failing to make a capital contribution to the joint venture as required by the Agreement. The district court granted Tyger's motion for summary judgment, and Pensacola appeals. We affirm.

I.

Tyger and Pensacola, as joint venturers and in accordance with the Agreement, entered into a contract with the Virginia Department of Transportation ("VDOT") to furnish materials and labor for the construction of a portion of a highway and a tunnel. According to the joint venture agreement, Tyger was to have a sixty percent (60%) interest in the joint venture and Pensacola a forty percent (40%) interest. Tyger and Pensacola were to make capital contributions in accordance with their percentage of ownership interest and to share profits on the same

percentages. The Agreement provided that working capital was to be furnished immediately by each partner upon request. Each partner made all required capital contributions until July 20, 1987, when Pensacola refused to make a requested contribution of $2,340,000. In order to continue to perform under the contract with the VDOT, Tyger increased its capital contribution to the joint venture to cover the amount requested of and not made by Pensacola. Tyger instituted this breach of contract action claiming that it was entitled to the $2,340,000, which it had advanced on Pensacola's behalf, plus interest on this advance in the amount of $450,000.

Pensacola counterclaimed against Tyger asserting that Tyger, prior to bid, made numerous misrepresentations concerning the manner in which the work would be performed and the maximum accounting and bookkeeping costs to be charged to the joint venture during the performance of the project. Pensacola also alleged that, after the contract was awarded, Tyger (1) concealed information regarding the project's progress, (2) improperly attempted to renegotiate with suppliers to lower their pre-bid price quotations, (3) failed to enter into contracts with suppliers and contractors on terms favorable to the joint venture, (4) failed to properly manage the joint venture's resources, and (5) misrepresented the availability of a supplier of sand. Based on these allegations, Pensacola sought recovery for breach of fiduciary duty and misrepresentation. It is not disputed that Tyger made its required contributions of capital and advanced $2,340,000 on behalf of Pensacola.

On April 21, 1989, Tyger moved to dismiss Pensacola's counterclaims for breach of fiduciary duty and

misrepresentation pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). On May 23, 1989, Tyger moved for summary judgment against Pensacola on its breach of contract action. By opinion and order of June 19, 1989, the district court granted Tyger's motion for summary judgment and awarded Tyger $2,790,000.[1] The sole issue on appeal is whether the district court erred in granting summary judgment in favor of Tyger. After considering the record in this case and the applicable law and hearing oral arguments, we find that the district court correctly granted Tyger's motion for summary judgment.

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[1] The district court also partially granted Tyger's motion to dismiss Pensacola's counterclaims, dismissing forty-eight (48) of the fifty-one (51) allegations of breach of fiduciary duty and misrepresentation against Tyger. On July 17, 1989, the three allegations remaining in Pensacola's counterclaim were tried before a jury. Pensacola abandoned two of the allegations, leaving only one issue for the jury's consideration. The jury returned a verdict in favor of Pensacola for $5.6 million Tyger moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. By opinion and order dated October 20, 1989, the district court granted Tyger's motion for a new trial finding "serious doubt" that Pensacola established by clear and convincing evidence all the elements of fraud and finding it "abundantly clear that the amount of damages awarded was against the clear weight of the evidence presented."

The retrial of the sole misrepresentation issue took place on February 21, 1990, and resulted in a jury verdict in favor of Pensacola in the amount of $1,578,250. Judgment was entered in favor of Pensacola in accordance with the jury's verdict on March 1, 1990.

II.

Rule 56 of the Federal Rules of Civil Procedure provides that a motion for summary judgment shall be granted if "there is no genuine issue of material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We find that the district court properly concluded no genuine issue of material fact existed in this case and that Tyger was entitled to a judgment as a matter of law.

The following material facts were undisputed in the district court:

> 1. Tyger requested of Pensacola the sum of $2,340,000 in July, 1987, and Pensacola has not paid it;
>
> 2. On five occasions prior to July, 1987, Tyger informally requested capital from Pensacola, and Pensacola contributed in accordance with the request;
>
> 3. On each of the five occasions prior to July, 1987, the request for capital was made by someone within Tyger's management;
>
> 4. On none of the five occasions prior to July, 1987, did the request for capital issue from the Managing Partner of the joint venture following the approval of the joint venture's Management Committee as the Agreement specified; and
>
> 5. On each of the five occasions prior to July, 1987, Pensacola contributed requested capital to the joint venture notwithstanding the fact that the procedure for requesting capital contributions specified in the Agreement was never adhered to.

In response to these undisputed facts, Pensacola asserts (1) that Tyger's breach of contract claim is barred as a matter of law until there has been an accounting and (2) that Tyger's claim is barred because Tyger failed to follow the Agreement in requesting capital from Pensacola.

First, with regard to Pensacola's contention that Tyger's claim is barred as a matter of law until there has been an accounting, we find that Tyger is not required to await an accounting of the joint venture before pursuing a breach of contract claim against Pensacola, its co-venturer. We follow the well settled rule that, when the dispute between joint venturers is over a breach of the joint venture agreement, a party may maintain an action at law without an accounting. *See, e.g., Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360 (9th Cir. 1927). An accounting on a substantial project such as the VDOT project is a detailed and time consuming proposition. If a joint venturer were forced to seek an accounting as a prerequisite to suing a co-venturer for failure to contribute working capital, the work of the joint venture could come to a halt subjecting the joint venture (and its co-venturers) to liability on a number of fronts. Moreover, if a joint venturer were required to seek an accounting prior to filing its breach of contract suit, a joint venturer, who honors its obligation to contribute working capital, would be seriously disadvantaged when its co-venturer reneged on its contractual obligation to contribute capital. Thus, we find that district court was correct in ruling that, as a matter of law, Tyger was not required to await an accounting of the joint venture prior to pursuing a breach of contract claim against Pensacola.

As to Pensacola's second contention, we find the district court correctly ruled that Pensacola was estopped from asserting that Tyger's failure to follow the Agreement excused Pensacola's failure to pay. Whether estoppel arises in any case is ordinarily a question to be determined by the trier of fact. *See Tidewater Equip. Co. v. Reliance Ins. Co.*, 650 F.2d 503, 506 (4th Cir. 1981). However, as the district court properly ruled, whether estoppel arises becomes a question of law when the facts are not in dispute or when only one reasonable inference can be drawn from the facts. *See Highlands Ins. Co. v. Allstate Ins. Co.*, 688 F.2d 398, 404 (5th Cir. 1982); *In re Metropolitan Int'l. Inc.*, 616 F.2d 83, 86 (3d Cir. 1980). In this case, the facts are not in dispute. Tyger concedes that the procedures set out in the Agreement for capital calls were not followed for the July 20, 1987 capital call or for any of the five previous capital calls. Pensacola admits that it honored the first five calls. The district court was correct in ruling that the question of whether Pensacola's actions raise an estoppel can be determined as a matter of law.

It is well established under Virginia law that the elements necessary to establish equitable estoppel, absent a showing of fraud or deceit, are (1) a representation, (2) reliance, (3) a change of position, and (4) prejudice. *Lataif v. Commercial Indus. Constr., Inc.*, 223 Va. 59, 286 S.E.2d 159, 161 (1982). The district court correctly ruled that each of these elements was satisfied by the undisputed facts in this case. First, the district court properly determined that the "representation" took the form of a course of conduct between the parties – Pensacola's honoring of the five previous capital calls without once raising an objection to the procedure followed. Second, the district court found

that the "reliance" and "change of position" elements were satisfied by Tyger's conclusion that the formal procedures set out in the Agreement need not be strictly adhered to when it made the July, 1987 capital call. Finally, the district court ruled that Tyger's forced contribution of $2,340,000 to keep the project going and to avoid a breach of the joint venture's contract with the VDOT satisfied the "prejudice" element. After considering the undisputed facts in this case and the applicable law and hearing the oral arguments, we find that the district court correctly ruled that Pensacola was estopped from asserting that Tyger's failure to request capital according to the procedures in the Agreement excused Pensacola's failure to pay.

III.

For the foregoing reasons, we find that the district court properly concluded that no genuine issues of material fact existed and that Tyger was entitled to a judgment as a matter of law. We therefore affirm the district court's grant of Tyger's motion for summary judgment.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

TYGER CONSTRUCTION CO., INC.,
Plaintiff,

v.

PENSACOLA CONSTRUCTION CO.,
Defendant.

Civil Action No. 88-185-NN

(Filed Feb. 1, 1991)

ORDER

On motion of the defendant, Pensacola Construction Co., and upon hearing, this court hereby APPOINTS United States Magistrate Tommy E. Miller to serve as a master pursuant to Rule 53, Federal Rules of Civil Procedure, for all matters relating to the nonjury trial of this accounting proceeding. Report of the master shall be filed in accordance with the provisions of Rule 53, Federal Rules of Civil Procedure.

The Clerk is DIRECTED to send a copy of this order to all counsel of record.

It is so ORDERED.

/s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
February 1, 1991
cc: counsel

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

Newport News Division

PENSACOLA CONSTRUCTION CO., a Delaware Corporation

V.

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually, and for the use and benefit of Tyger-Penscola [sic] Joing Venture

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C.A. 88-185-NN

(Filed Apr. 25, 1990)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered. by the Honorable Rebecca Beach Smith.

IT IS ORDERED AND ADJUDGED that TYGER CONSTRUCTION COMPANY INCORPORATED'S Motion for Partial Judgment Notwithstanding the Verdict is DENIED.

A TRUE COPY, TESTE:
Doris R. Casey, Clerk
By /s/ Paula M. Lankford
Deputy Clerk

April 19, 1990
Date

DORIS R. CASEY
Clerk

cc: counsel, o.b.

/s/ Paula M. Lankford
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

Newport News Division

PENSACOLA CONSTRUCTION CO.,
plaintiff,

V.

TYGER CONSTRUCTION COMPANY INCORPORATED,
defendant.

VERDICT

CASE NUMBER: CA-88-185-NN

(Filed Mar. 1, 1990)

WE, THE JURY, FIND: for the plaintiff, PENSACOLA CONSTRUCTION CO., and fix damages at $1,578,250, pursuant to the attached itemization of damages.

/s/ Rosalie M. White — March 1, 1990

FOREPERSON'S SIGNATURE — DATE

ITEMIZATION OF DAMAGES

Move to Hula/Chisman	977083
Additional Barge Costs	279740
Increased costs of mining an uneconomical sand pit	1268448
Excess supervisor salaries at sand pit	90543
Excess DBE fee paid for move to different pit	38866
Increased costs due to excessive time	1270122
Excess costs due to subcontract to Great Lakes	20825
TOTAL	394567 x .40 = 1578250

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

PENSACOLA CONSTRUCTION CO.,	)	CIVIL ACTION
	)	No. 88-185-NN
Plaintiff,	)	
	)	
v.	)	
	)	
TYGER CONSTRUCTION COMPANY, INC.,	)	
	)	
Defendant.	)	
	)	

EXCERPT OF PROCEEDINGS

Newport News, Virginia
February 21, 1990

(Argument Concerning Admission of Expert Testimony)

Before: THE HONORABLE REBECCA BEACH SMITH, Judge, and a Jury

Appearances:

MILLER, BASH AND STARRETT
By: ROY BASH, ESQUIRE
CURTIS L. TIDEMAN, ESQUIRE

WRIGHT, ROBINSON, McCAMMON, OSTHIMER & TATUM
By: STEPHAN F. ANDREWS, ESQUIRE
Counsel for Pensacola Construction

WILLIAMS, MULLEN, CHRISTIAN & DOBBINS
By: SAMUEL W. HIXON, III, ESQUIRE

THE HONORABLE REBECCA BEACH SMITH

* * *

[3] Now, in regard to the experts, Mr. Van Dyke and Mr. McCoy, this is the way I leave it at this point in time, [p. 4] and you all can deal with the ruling as you deem appropriate in your opening statement. Until I have heard the qualifications of these individuals, I frankly don't know whether they are qualified or not to testify in these matters.

Now, Mr. Bash, you are running the risk, if you offer it in opening statement that you plan to present expert testimony on this point and that point and you don't, I will make some curative instruction to the jury, or when I strike the individuals as experts, I will have to say to them that reference was made in opening statement to experts, and the Court has now determined that these individuals aren't qualified, and therefore you need to consider the evidence accordingly.

But I'm not going to rule right now, Mr. Hixon, on that. I'm not ready to rule on their qualifications. I need to hear from the witnesses themselves. The Court may have some examination of these individuals, and I will tell you that I'm inclined, if a man has been involved in the construction industry for X number of years and he is used to making estimates and dealing with the figures and the documents, I'm inclined to think he may well be an expert in the area.

In terms of the economics of it, I don't know. I'm not sure how the projections turn out. But then it [p. 5] would seem to me that Mr. Van Dyke, if he is an economist,

would be qualified to make projections if he is provided the appropriate underlying data. I don't rule on in that regard, but I'm just saying that – I don't rule on their qualifications, but it appears to me that they have been properly listed now as experts, and my review of the materials in front of me may well indicate that they will be qualified as experts in the area.

In terms of the fact basis, as a general matter, I'm of the opinion that Rule 705 will allow an expert, once they are qualified – and I think that is a threshold area for any expert – once an expert qualifies in a particular field, I think that the Court and the jury can consider any opinion that the expert renders. I believe that if an expert doesn't have an adequate fact basis for that opinion, that is a matter to be brought out on cross-examination.

That is your role as an advocate, and then it is your role as an advocate to argue to a jury that this opinion is not properly based in fact, it should not be given much weight by the jury, if any at all. And I think that basically where you say that there are fallacies in the analysis and fallacies in the reasoning process and in the bases, that those are matters for cross-examination and argument. I make that a general ruling in regard to what you said.

[p. 6] On the particular points, at this point in time, these are the matters pending the expert qualifying that I feel are appropriate for reference in the opening statement. The five areas – and I'm going to follow the five areas that Mr. Hixon brought out. Apparently there is no objection to Mr. McCoy and Mr. Van Dyke testifying about the costs incurred by the joint venture at Epps Island, comparing the documents with – and the Chisman

– at 1.1 million basically, comparison of documents where he says he is basically a fact witness. It appears that that will be an appropriate area, and you can make reference to that in your opening statement.

At this juncture, I have reviewed Judge Kellam's charge to the jury. I have already done that. That is a portion of the trial that I have reviewed and have actually copied for my file here. And based upon my understanding of the case – and I would tell you that I did spend at least three days going through this file and reviewing it, and my understanding of it at this juncture, I think it would be appropriate, if Mr. McCoy and Mr. Van Dyke qualify, to allow the testimony on the increased costs in mining at Epps Island as opposed to the Waitman tract, using the Chisman tract as a yardstick in terms of creating a hypothetical situation. That's the $3 million portion of Mr. McCoy's testimony.

[p. 7] The objections that I have heard here today basically argue there is a fallacy in the analogy, and, as I have said before, I think that is an appropriate matter for cross-examination. So I think that reference at this juncture – I'll entertain further argument if you think it appropriate, Mr. Hixon, but I haven't heard enough now – I'm not going to hold the jury up for me to exclude reference to that in opening statement.

If at some point in the trial I do exclude it, it will just have to be taken care of in instructions to the jury during the trial or at the close of the evidence.

In regard to the delay claim, I agree that this is a new trial. However, facts are facts, and you either have the facts or you don't have the facts. And I haven't heard

anything here this afternoon that changes what Judge Kellam has said on page 15 of his opinion and order filed October 20, 1989. And I read from the first full paragraph on the page, starting with the second sentence.

"The costs associated with the barges and the two-month extension of the project relate to the delay in completing the sand operation. The Court refused to instruct the jury on the subject of delay-related damages because it was unchallenged that the joint venture was never without a sufficient source of sand. Therefore, the failure to secure the Waitman tract could not be the proximate cause [p. 8] of any expenses incurred as a result of delay in the project."

And until such time as you make an appropriate proffer – if you want to bring a witness in here and you want to proffer some testimony and evidence to me, I'll reconsider the ruling.

But until I have an appropriate proffer, I haven't heard anything here today that tells me that you now have any evidence that there was any period of time on this project that there was a delay because of a lack of a sand source. And at this juncture, I'm not going to allow any reference to the 4.4 million that you seem to be claiming, for Mr. McCoy and Mr. Van Dyke on basically a delay claims, until such time as a proper foundation is submitted to the Court for the expert, if he so qualifies, making any delay calculation.

If that is submitted, then I will reconsider the ruling. You can present the evidence, the jury will hear it, and you can argue accordingly, and I will instruct accordingly. But right now, while it is a new trial, I don't know of

anything where the facts have changed. No one has told me the facts have changed, and if you didn't have the facts last time, I don't know where you are going to get them from this time, and certainly Mr. McCoy was not prohibited from being a fact witness, and I haven't heard [p. 9] anything to that effect.

Likewise, on the additional barge costs, I don't know that that calculation – it is eight hundred twenty-nine – is that what I saw somewhere? I read the motion, and I looked at the calculation that had been submitted by Mr. McCoy.

MR. HIXON: Your Honor, it is $829,222.

THE COURT: Whatever the barge costs, the same ruling applies as it does for the delay costs. Until such time as I get some evidence that there is anything – that there is any evidence at all, I'm not going to create the same situation we had last time with reference to a lot of damages, a lot of cost overruns, a lot of damages that were never proven to the jury, and then we have set up another situation where the Court has to retry this case, and that's what I want to avoid. We simply don't have the resources in the system to keep trying this case over and over.

So that I haven't heard anything that would convince me that there was anything – that there is any changed circumstances. Again I invite you, if you have evidence to proffer, to proffer it, and I'll reconsider my ruling.

Finally, on the excess costs due to subbing out to Great Lakes by the joint venture, the objection I heard there was again it was a confusing calculation, and there

[p. 10] were problems with the calculation. I frankly am not clear enough on the calculation to know precisely how to rule, so at this time I'm going to allow you to mention it. You run the risk that you may lose this claim in the course, but the objection I heard was the same as I heard for point two for Mr. Hixon, is I think your analysis is weak and I don't know how you backed up these costs and I don't know how you figured this.

But if you think you can shown some damages by having a lack of a sand source because something was subbed out to Great Lakes, I'll give you that opportunity. But I'm having difficulty understanding if it was – sounds like to me from what Mr. Hixon – now, you may say his calculations have fallacy, but under the calculations he gave the Court, you profited on the deal, what was it, $4 versus $10, so you had a $6 betterment, but I don't know if he is right, and in my review of the record, I'm not sure who is right on that point.

So I would let you at this point continue to claim that element of damage. I want you to understand that if it is not properly shown, I would strike it.

So that's my ruling in regard to Mr. Van Dyke and Mr. McCoy at this time. I haven't yet qualified them as experts, but I am going to let the plaintiff go forward at least in regard to the three points that I have mentioned

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

TYGER CONSTRUCTION COMPANY INCORPORATED, etc.,

Plaintiff,

v.

Civil Action
No. 88-185-NN

PENSACOLA CONSTRUCTION CO.,

Defendant.

OPINION AND ORDER

Plaintiff, Tyger Construction Company, Inc. ("Tyger"), brings this motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, seeking to have the jury's award of $5.6 million in favor of defendant, Pensacola Construction Co. ("Pensacola"), set aside. For the following reasons, Tyger's motion for judgment notwithstanding the verdict is **DENIED** and Tyger's motion for a new trial is **GRANTED.**

I.

Tyger and Pensacola entered into a joint venture to construct sand islands for the Interstate 664 bridge-tunnel from Newport News, Virginia, to the Bower's Hill area. Tyger was the sponsoring party and, therefore, was responsible for the day to day activities of the Joint Venture. Tyger contributed 60% of the capital to the Joint Venture, was responsible for 60% of the liabilities or losses and was entitled to 60% of the profits. Pensacola

was the investing party, contributed 40% of the capital, was responsible for 40% of the liabilities or losses and was entitled to 40% of the profits. Among the items necessary for the performance of the contract with the state was sand and rock to be used in constructing the islands. After the parties had agreed to form the Joint Venture, Tyger furnished to Pensacola its estimate of the cost of the various work to be performed and the materials to be furnished. Pensacola was to have its engineers and estimators review each item and make their own estimates of the costs. One of the most costly portions of the project was the supplying of the sand to build the islands.

While the Joint Venture was preparing the bid and actually performing the contract, Great Lakes Dredging Company ("Great Lakes") was dredging sand for deepening the Hampton Roads channel. The sand dredged was a potential source of sand for the construction of the islands. The Joint Venture discussed the purchase of sand with Great Lakes during the time the bids were being prepared and having it deliver the sand in place, i.e., as a subcontractor. Tyger was of the opinion that the price quoted was high. In an effort to obtain a better price for the sand, Tyger contacted Lone Star Cement Company ("Lone Star") which had several sources of sand, and obtained a price per cubic yard and per ton on sand mined from each of four available Lone Star pits. Tyger intended to compare this price with the price quoted by Great Lakes and to try to negotiate a better price from Great Lakes.

At the pre-bidding meeting between Tyger and Pensacola, held July 11 and 12, 1985, the parties exchanged

bidding documents and guidelines on which they were going to put their independent estimates together, after which Pensacola "proceeded with formulating [its] own estimate of the project." T.R. p. 133. This was the usual practice in joint ventures. Henry B. McCoy, Vice-President of Pensacola, and Ronald Cappocia, chief estimator for Pensacola's parent company, Massman Construction, attended that meeting. The purpose of the meeting was for the parties to compare and put together their estimates. Pensacola was of the opinion that the supply of sand should be left to subcontractors and made that clear to Tyger. McCoy testified that at that meeting he asked Paul Silvestri, Tyger's Vice-President of engineering, whether permits for mining sand from the upland sources were in order and Silvestri said "they were not." (T.R. McCoy p. 8) McCoy said he had no further discussions about an upland sand source after July 11th. Cappocia testified that Tyger said it had not looked into the question of permits and was not aware of what permits would be required at the time of this meeting.

The parties met again on July 22, 1985, to agree upon the bid to be submitted to the state on July 23rd. Kerry Reardon, President of Pensacola at the time, and Cappocia, attended on behalf of Pensacola. At that meeting, Tyger advised Pensacola that they did not feel they were going to get a favorable price on sand from Great Lakes; that they had investigated other sources of sand; and that they were working with Lone Star to obtain the needed supply of sand. The primary issue in this case concerned Paul Silvestri's statement to Pensacola regarding the availability of the sand source provided by Lone Star. Pensacola argued that Tyger had committed fraud by

representing the fact that Tyger had a secure source of sand at the Waitman pit at Shirley hole with all necessary permits, quality and quantity of sand. The evidence presented at trial concerning this alleged misrepresentation was contradictory and will be discussed in detail below. It was uncontested that the estimate for the cost of sand to be obtained from Lone Star was $5.45 per cubic yard delivered in place, and that Tyger felt this bid would give the Joint Venture an advantage in the bid competition. Cappocia testified that at the meeting on July 22nd, Tyger informed him that they had found another upland source of sand and were preparing an estimate based on this source and that this was necessary to maintain competitive bidding. Cappocia also testified that he reviewed the estimate of the work necessary to mine and transport the sand and place it at the islands. He was of the opinion that the estimate was a little on the cheap side.

The Joint Venture submitted its bid on July 23, 1985, using an estimate of sand supply from Lone Star. The Joint Venture submitted the lowest bid and was awarded the sand island project. After the bid was submitted, the Joint Venture learned that it would be unable to use the Waitman tract because Lone Star could not reach an agreement with the owner of the tract over royalties for the use of the land. The Joint Venture then decided to mine sand from Eppes Island, a nearby sand pit also owned by Lone Star. The Joint Venture mined approximately 1.7 million tons of sand from Eppes Island but this was not enough to complete the project. Anticipating this shortfall, the Joint Venture then moved its mining operations to the Hula-Chisman tract. During this time,

the Joint Venture also purchased some sand from Great Lakes.

The Joint Venture's construction project was completed in September 1987. It suffered a $15 million cost overrun. The bid price for the entire project was $42 million. This figure included a profit margin of approximately $4.9 million. The actual cost of the entire project was approximately $57 million, well in excess of the bid price. The sand operation itself also ran over budget. It was bid at approximately $10 million. The actual cost of the sand operation was approximately $23 million.

In December 1988, Tyger filed a complaint against Pensacola seeking to recover capital contributions that Pensacola owed the Joint Venture. Pensacola filed a counterclaim alleging, among other things, that Tyger had misrepresented the availability of the Waitman tract during the July 22, 1985 meeting. Tyger moved for and was granted summary judgment on its claim for contribution. On July 17, 1989, the parties went to trial on the following three issues raised in Pensacola's counterclaim: (1) Whether, on July 22, 1985, Paul Silvestri of Tyger told representatives of Pensacola that Tyger had secured a source of sand for the Joint Venture from Lone Star which had all necessary permits and a sufficient quality and quantity of sand; (2) whether Tyger misrepresented to Pensacola for months that there was no problem in obtaining all the sand from the source when, in fact, there was a problem; and (3) whether Tyger concealed correct and accurate financial information from Pensacola. Pensacola failed to present evidence on the second and third issues and, therefore, at the close of all evidence, the

Court directed a verdict in favor of Tyger on those issues. Only the first issue was presented to the jury.

The jury rendered a verdict in favor of Pensacola and awarded Pensacola $5.6 million in damages. Tyger now argues that there was insufficient evidence produced at trial to support the jury's verdict, and that it is contrary to the law and the evidence.

II.

In ruling on a motion for judgment notwithstanding the verdict, the trial court "must consider the record as a whole and in the light most favorable to the party opposed to the motion." *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980). The motion should be denied if there is "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party." *Id.* Therefore, "[w]here there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side." *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941).

The standard for granting a new trial differs significantly from the standard for granting judgment notwithstanding the verdict. A motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure may be granted even when there is substantial evidence to support the verdict. The granting of a new trial is not simply a discretionary action by the trial judge. The Court of Appeals for

the Fourth Circuit has made clear that "a trial judge has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence 'if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice.' " *Wyatt*, 623 F.2d at 891-892 (quoting *Aetna Casualty*, 122 F.2d at 354). *See also, Gill v. Rollins Protective Services Co.*, 836 F.2d 194, 196 (4th Cir. 1987); *Johnson v. Parrish*, 827 F.2d 988, 991 (4th Cir. 1987); *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 594 (4th Cir. 1985). In considering such a motion, "the trial court may weigh the evidence and consider the credibility of the witnesses." *Wyatt*, 623 F.2d at 891. *See also, Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987). Unlike the motion for judgment notwithstanding the verdict, in considering a motion for a new trial, the judge need not consider the evidence in the light most favorable to the nonmoving party. Rather, the trial court should consider "the weight of all the evidence, considering also any other relevant factors." *Williams v. Nichols*, 266 F.2d 389, 393 (4th Cir. 1959). *See also*, 11 Wright & Miller, Federal Practice and Procedure, Civil §2806 (1973).

It should be noted that the duty of the trial judge to grant a new trial when, in his opinion, the verdict is against the clear weight of the evidence does not undermine the traditional role of the jury. The Court of Appeals for the Fourth Circuit explained the [sic] "[t]he exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Aetna Casualty*, 122 F.2d at 353.

In assessing the sufficiency and weight of the evidence presented at trial, it is necessary to set out the

elements of the fraud action that Pensacola needed to establish at trial. Under Virginia law, the elements of actual fraud are: "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, and (5) resulting in damage to the party misled." *Winn v. Aleda Construction Company, Inc.*, 227 Va. 304, 315 S.E.2d 193, 195 (1984). *See also, John C. Holland Enterprises, Inc. v. J. P. Mascaro & Sons, Inc.*, 653 F.Supp. 1242, 1248 (E.D. Va. 1987), *aff'd.*, 829 F.2d 1120 (4th Cir. 1987). Furthermore, "[i]n Virginia, the party misled must rely on the misrepresentation and be damaged by it." *Meadow Ltd. Partnership v. Heritage Savings and Loan Assoc.*, 639 F.Supp. 643, 652 (E.D. Va. 1986). *See also, Gold Ranch Resort Motel, Inc. v. Tar Heel Mortgage Co.*, 341 F.Supp. 846, 851 (E.D. Va. 1972). Thus, to establish a cause of action for fraud, Pensacola had to prove that it was subject to a misrepresentation of a material fact and that it suffered damages as a result of the misrepresentation. The Supreme Court of Virginia stated that "[a]n allegation of fraud in the abstract does not give rise to a cause of action; it must be accompanied by allegation and proof of damages." *Community Bank v. Wright*, 221 Va. 172, 267 S.E.2d 158, 160 (1980). The party alleging fraud must prove fraud by clear and convincing evidence. *Winn*, 315 S.E.2d at 195. *See also, Erlich v. Hendrick Construction Company, Inc.*, 217 Va. 108, 225 S.E.2d 665, 670.

At trial, the Court instructed the jury on fraud according to Virginia law. On the issue of actual fraud the Court stated:

> **Actual fraud is the intentional misrepresentation of an existing material fact with the intent to mislead another person, which that person**

> relies upon with the result that he is damaged thereby.

The Court also instructed the jury on the issue of constructive fraud:

> Constructive fraud is the innocent or mistaken misrepresentation of a material fact with the intent that a person rely on it and which that person relies upon with the result that he is damaged thereby.

The Court made clear to the jury that Pensacola had the burden of proving fraud by clear and convincing evidence. This included the burden of proving the existence of a misrepresentation and the fact that Pensacola suffered damages as a result of that misrepresentation by clear and convincing evidence.

Proof of the amount of damages should be distinguished from proof of the fact that damages were suffered. The Court instructed the jury that if it found for Pensacola on its claim of fraud, it would then have to determine the amount of damages that Pensacola suffered as a result of the misrepresentation. The amount of damages need only be proved by a preponderance of the evidence. The Court instructed the jury as to both the requirement of proving a casual connection between the misrepresentation and the amount of damages sought and the specific measure of damages to be awarded. The instruction as to the necessity of proving a casual connection was also relevant to proof of the fact of damages, one of the elements that needed to be established to prove fraud. As to that requirement, the Court instructed the jury as follows:

> Pensacola bears the burden of establishing a casual connection between Tyger's alleged breach and the damages claimed.
>
> You should award Pensacola an amount of money shown by a preponderance of the evidence to be fair and adequate compensation for the loss or damages proximately resulting from such fraud.

The Court went on to explain that the measure of damages in this case was:

> The difference between the cost of obtaining the required amount of sand from a source other than the Waitman tract as opposed to what it would have cost if obtained from Waitman along with any other increased cost resulting from the nonavailability of Waitman.

In ruling on Tyger's motion, therefore, the Court must consider the sufficiency and the weight of the evidence presented to the jury on three issues. First, whether there was a misrepresentation as to the availability of the Waitman tract. Second, if a misrepresentation occurred, whether Pensacola suffered any damages as a result of that misrepresentation. Third, if there was a misrepresentation and damages, what was the amount of damages suffered by Pensacola.

III.

Pensacola contends that the evidence it produced at trial, when considered in the light most favorable to Pensacola, is sufficient to preclude the Court from granting Tyger's motion for judgment notwithstanding the verdict. A final determination of the sufficiency of the

evidence produced by Pensacola need not be made at this point because the jury's verdict is so clearly against the weight of the evidence presented, necessitating a new trial. The question of the sufficiency of the evidence may be left to the jury at the next trial. Accordingly, Tyger's motion for judgment notwithstanding the verdict is **DENIED.**

In deciding Tyger's motion for a new trial, the Court must examine the weight of Pensacola's evidence as to the existence of a misrepresentation, the existence of some damage to Pensacola, and as to the amount of damages awarded.

On the issue of misrepresentation, Pensacola asserted that Tyger, through Paul Silvestri, had misrepresented the availability of the Waitman tract during the July 22nd pre-bid meeting. Pensacola argued that Silvestri told it that sand from the Waitman property was available, that all necessary permits were available and that it contained sufficient quality and quantity of sand to complete the project. The primary witnesses to the alleged misrepresentation were Paul Silvestri, of Tyger, who testified through deposition, and Kerry Reardon and Ronald Cappocia of Pensacola. Silvestri testified that Tyger presented all the information it had available from subcontractors and suppliers to Pensacola at the July 22, 1985 meeting. He stated that Tyger had a firm quotation for the sand source from Lone Star and made Pensacola aware of that quotation. On the issue of what was actually communicated to Pensacola regarding the Waitman tract, Silvestri affirmed that he had passed on to Pensacola that Lone Star was representing that sand was available from the Waitman tract and that permits were available for mining

the sand, but that Tyger had not obtained any permits for the property. He said that "on the quotation from Lone Star, Lone Star represented that the permits and everything that was required was in order." (T.R. Silvestri p. 76). Lone Star confirmed its commitment by letter of August 12, 1985, which is Trial Exhibit 7.

Kerry Reardon testified that at the meeting on July 22, he asked Silvestri about the upland sand source and the permits. According to Reardon, Silvestri "said the permits were no problem, and he had the specific site and had been through it all, we had sufficient quantity and quality of sand, and that he had this source through Lone Star." (T.R. pp. 143-144). Reardon also testified that Pensacola had been told that "the sand source was secure." (T.R. p. 146). On cross-examination, Reardon stated that the sand source had been identified by Tyger as the Waitman tract and he conceded that Silvestri had told Pensacola "that he had received a quote" from Lone Star on the property. (T.R. p. 206-207)

Cappocia also testified on the issue of the misrepresentation. He stated that at the July 22 meeting, Silvestri told him that Tyger had found another source of sand and was preparing an estimate. According to Cappocia, Silvestri said that this was from an existing source at Shirley Hole which was the Waitman property and that it was "coming out of an existing quarry right now and that the permits and availability were no problem at all," (T.R. p. 174) and that he had a price from Lone Star. Cappocia also testified that he "assumed there was a secure source of sand, sufficient materials and quality in reviewing the estimates." (T.R. p. 276).

Finally, Pensacola offered the testimony of Dick Lynch, a former employee of Lone Star, on the issue of the misrepresentation. Lynch testified that he had discussed all the available Lone Star properties and the prices on each with Silvestri the night before the project was bid. Lynch stated that he told Silvestri that Lone Star did not have a permit on Waitman at that time or a settled agreement with the owners of the property, but that Lone Star thought it could get the required permits. (T.R. p. 295). On cross-examination, Lynch admitted that Lone Star would not have given a quote on the Waitman tract if it did not believe that it could make the property available. (T.R. p. 306).

There is serious doubt whether the above testimony, "the permits were no problem," is sufficient to meet the test of establishing fraud by clear and convincing evidence. This is especially true in light of Silvestri's testimony that he merely relayed Lone Star's quotation to Pensacola; Lynch's admission that Lone Star would not have given the quote on Waitman if it did not think that it could obtain the permits; Reardon's admission that what he received from Tyger was a quotation from Lone Star; and Cappocia's statement that he assumed the source was secure from reading the estimates. While it may appear that Pensacola did not establish the existence of a misrepresentation by clear and convincing evidence, in view of the court's determination that a new trial must be granted, it is not necessary at this time that the Court make a finding on whether the evidence meets the test of establishing fraud. The jury's verdict on the issue of damages is clearly against the weight of the evidence presented, and without support, necessitating a new trial.

Therefore, the issue of whether or not Pensacola can establish a misrepresentation as to the Waitman tract by clear and convincing evidence will be left for the jury at the new trial.

Pensacola's evidence on the issue of damages came primarily from the testimony of Henry B. McCoy, President of Pensacola. McCoy testified that the bid price for the sand operation was approximately $10 million and that the actual cost of the sand operation was $23 million. McCoy then testified about the various costs incurred by the Joint Venture in conducting the sand operation.

McCoy testified that the Joint Venture was forced to move its sand mining operations from the Eppes Island site to a new location called Hula-Chisman when the sand supply at Eppes Island ran low. He stated that the total cost of the move to Hula-Chisman was $1,260,530.

McCoy next testified that the Joint Venture incurred costs in the search of a new source of sand. Pensacola, however, produced no evidence as to the dollar amount of such costs. The Joint Venture also had expenses for renting and insuring barges for transporting the sand to the sand islands. According to McCoy, the Joint Venture experienced unnecessary expenses because the barges sat idle for much of their rental term. McCoy went on to testify that the Joint Venture suffered an additional cost of $2,000,000 when the project had to be extended for two months beyond the originally scheduled completion date. Finally, McCoy outlined the following expenses which he believed the Joint Venture incurred as a result of the purchase of sand from Great Lakes: $171,804 for sand barges that the Joint Venture did not get to use when it

purchased the sand from Great Lakes; $86,294 as a credit given to the state for deviating from the specifications of the bid by using two sources of sand instead of one; and $1,243,093 for idle equipment and purchased sand.

On cross-examination, McCoy admitted that the cost of sand from Great Lakes was less than the cost of sand from the upland sources and that the Joint Venture actually saved $1,250,000 by purchasing sand from Great Lakes. McCoy also admitted that the royalties charged for mining at Eppes Island were less than those which would have been charged at Waitman and that, as a result, the Joint Venture saved 11¢ per ton of sand over the bid price on the 1.7 million tons of sand that were mined at Eppes Island. This amounts to a total savings of $187,000. McCoy conceded that the Joint Venture had saved at least $170,000 by mining sand from Eppes Island.

Pensacola was required to establish a casual connection between any damages it claimed and the misrepresentation as to the availability of the Waitman tract. However, for most of the figures cited by McCoy, Pensacola produced no evidence which would establish this casual connection. The only expenses for which the jury could reasonably infer a casual connection to the misrepresentation were those associated with the search for a new source of sand and the move to Hula-Chisman. If the Waitman property had been a secure source of sand with sufficient quality and quantity of sand, there would have been no need to move the operation to Hula-Chisman. Thus, the jury could have considered the $1,260,530 as part of the damages relating to the misrepresentation. The expenses associated with the search for a new source of sand, however, were never quantified for the jury.

Therefore, the jury had no basis upon which to award damages for the search.

The remaining expenses were never casually related to the failure of the Waitman tract and, therefore, should not have been considered by the jury in assessing damages. The costs associated with the barges and the two month extension of the project relate to the delay in completing the sand operation. The Court refused to instruct the jury on the subject of delay related damages because it was unchallenged that the Joint Venture was never without a sufficient source of sand. Therefore, the failure to secure the Waitman tract could not be the proximate cause of any expenses incurred as a result of delay in the project. In fact, the issue of delay was never presented to the jury. The expenses related to the purchase of sand from Great Lakes were also never casually connected to the failure of the Waitman tract. Pensacola produced no evidence which would suggest that the Joint Venture purchased sand from Great Lakes because it was without a supply of sand. Moreover, on cross-examination, Reardon admitted that Great Lakes was reducing their prices because they still wanted to get in on the project. (T.R. p. 226). This fact lends credence to Tyger's argument that the Joint Venture purchased sand from Great Lakes as a business decision and not because they were in need of a new source of sand.

Thus, the only quantified damages that were casually connected to the failure of the Waitman tract were the $1,260,530 associated with the move to Hula-Chisman. On cross-examination, however, McCoy admitted that the Joint Venture had experienced a total cost savings of $1,420,000. While the evidence creates doubt as to

whether Pensacola established, by clear and convincing evidence, that Pensacola established all the elements of fraud, it is clear it has not established damages as found by the jury.

It is abundantly clear that the amount of damages awarded was against the clear weight of the evidence presented and, therefore, the Court has a duty to grant a new trial. To reach a verdict of $5.6 million, the jury would have had to conclude that the Joint Venture suffered $14 million in damages as a result of the misrepresentation. Yet, the only quantified damages that the evidence suggested were casually connected to the misrepresentation were those associated with the move to Hula-Chisman. Even without considering the evidence as to the savings enjoyed by the Joint Venture, the evidence presented at trial suggested that the Joint Venture suffered only some $1,260,530, far less than the $14 million that the jury would have had to have found to award Pensacola $5.6 million. To allow a verdict so obviously against the clear weight of the evidence to stand would work a great injustice in this case. Accordingly, a new trial is necessary to arrive at a just resolution of the issues in this case.

IV.

While no suggestion has been made that granting of a new trial should in any way be limited to any issue, it is appropriate to comment on such an issue.

The law seems clear that the Court may, in a proper case, grant a new trial on some of the issues without doing so as to others. Rule 59(a) of the Federal Rules of

Civil Procedure. *See also Gasoline Products Company, Inc. v. Champlin Refining Company,* 283 U.S. 494, 499, 51 S.Ct. 513, 515 (1931); *Magenal v. Aetna Freight Lines, Inc.,* 360 U.S. 273, 79 S.Ct. 1184 (1959); *Eximco, Inc. v. The Trane Company,* 748 F.2d 287 (5th Cir. 1984). In *Gasoline Products,* the Court pointed out that the practice of permitting a partial new trial . . . "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." (Citations omitted.) 283 U.S. at 500, 515 S.Ct. at 515. The above language was quoted with approval in *Eximco,* 748 F.2d at 290 and in *Witco Chemical Corporation v. Peachtree Doors, Inc.,* 787 F.2d 1545, 1549 (Fed. Cir. 1986). In *Eximco,* the Court said that *Gasoline Products* "established the rule that even when only one issue is tainted by error . . . a new trial must nevertheless be granted on all issues 'unless it clearly appears the issue to be retried is so distinct and separable from the others that trial alone may be had without injustice'." 748 F.2d at 290.

In dealing with a motion for a partial new trial, the Court must consider the totality of the facts and circumstances such as whether some issues are completely separate from others, what evidence is to be presented and the resulting injury, if any, and whether the evidence relating to some issues as opposed to others is so interwoven with issues already tried and disposed of are so interwoven that it can be presented "without confusion and uncertainty, which would amount to a denial of a fair trial." *Gasoline Products,* 293 U.S. at 500-501, 51 S.Ct. 515.

The issue of fraud in this case is so inextricably interwoven with that of damages that it would be unfair

to submit only the issue of damages to the jury. In addition, at the retrial, other issues may arise. To accurately determine the amount of damages in this case, the jury needs to know not only whether a misrepresentation occurred, but also the scope of the misrepresentation and the importance of the misrepresentation in the context of the entire project. Simply informing the jury that Tyger misrepresented the availability of the Waitman tract would not give the jury a solid foundation upon which to make a determination of damages. The issues of liability and damages are not clearly distinct and separable in this case. Therefore the Court finds that a new trial on both issues is proper.

CONCLUSION

Accordingly, Tyger's motion for judgment notwithstanding the verdict is **DENIED** and Tyger's motion for a new trial is **GRANTED.**

Copies of this Opinion and Order are forwarded to counsel.

/s/ Richard B. Kellam
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
October 20th, 1989

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

Newport News Division

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually, and for the use and benefit of Tyger-Pensacola Joint Venture,

Plaintiff and Counterclaim Defendant

vs.

PENSACOLA CONSTRUCTION CO., a Delaware Corporation

Defendant and Counterclaim Plaintiff

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C.A. 88-185-NN

(Filed Jul. 21, 1989)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict before the Honorable Richard B. Kellam.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that on the counterclaim of Pensacola Construction Co. against Tyger Construction Company Incorporated that the counterclaim plaintiff, Pensacola Construction Co., recover of the counterclaim defendant, Tyger Construction Company Incorporated, the sum of FIVE MILLION SIX HUNDRED THOUSAND DOLLARS ($5,600,000.00), with interest

thereon at the rate of 8.16 per cent as provided by law, and its costs of action.

A TRUE COPY, TESTE:
Doris R. Casey, Clerk

By /s/ Paula M. Lankford
Deputy Clerk

July 20, 1989
Date

DORIS R. CASEY
Clerk

cc: Sam Hixon, Esq.
Stephen F. Andrews, Esq.
Roy Bash, Esq.
o.b.

/s/ Paula M. Lankford
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

Newport News Division

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually, and for the use and benefit of Tyger-Pensacola Joint Venture,

vs.

PENSACOLA CONSTRUCTION CO., a Delaware Corporation

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C.A. 88-185-NN

(Filed Jul. 3, 1989)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered by the Honorable Richard B. Kellam.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Tyger Construction Company, Inc.

against Pensacola Construction Co. for $2,790,000.00 with interest and costs.

A TRUE COPY, TESTE:
Doris R. Casey, Clerk

By /s/ Paula M. Lankford
Deputy Clerk

June 30, 1989
Date

DORIS R. CASEY
Clerk

cc: William Mauck, Jr., Esq.
Stephen F. Andrews, Esq.
Roy Bash, Esq.
o.b.

/s/ Paula M. Lankford
Paula M. Lankford
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

TYGER CONSTRUCTION COMPANY, INC., etc.,

Plaintiff,

v.

PENSACOLA CONSTRUCTION CO., etc.,

Defendant.

Civil Action No. 88-185-NN

(Filed Jun. 30, 1989)

ORDER

By Order of June 21, 1989, the Court granted plaintiff Tyger Construction Company, Incorporated (Tyger) summary judgment on its claim against Pensacola Construction Co. (Pensacola) to recover of Pensacola $2,790,000.00. Tyger has now moved the Court to direct entry of a final judgment on its aforesaid claim, and suggested to the Court there is no just reason for delay. Pensacola opposes the motion.

Tyger and Pensacola, as joint venturers, entered into a contract to furnish materials and labor for the construction of a portion of a highway and tunnel for the Virginia Department of Transportation (VDOT). Under their joint venture, Tyger was to have a sixty percent interest in the joint venture and Pensacola a forty percent interest. They were to make contributions to working capital in accord with their percentage of ownership interest. Working capital was to be furnished immediately by each partner, upon request. Each partner made the contributions upon request until July 20, 1987, when Pensacola was requested

and refused to make its contribution of $2,340,000.00. In order to continue with the performance of the contract, Tyger advanced that sum, in addition to meeting its call for capital. This action followed in which Tyger established that in addition to making its contribution to capital, it advanced the $2,340,000.00 which Pensacola refused to pay, and that there was due it $450,000.00 in interest on such advance.

By early 1987, it was clear the joint venture would sustain substantial losses on the project. This, in part, necessitated the call for additional capital.

Pensacola filed a counterclaim in this action asserting that Tyger had failed to keep it advised of the progress on the project; had failed to negotiate proper contracts for obtaining needed materials for the project, failed to properly manage equipment and performance of the contract and failed to provide it with a proper accounting. There is no suggestion that Tyger has not made its contributions to capital or that it did not advance the aforesaid sum on behalf of Pensacola. Pensacola seeks a full accounting and has urged the Court to refer the case to a Master.

Tyger urges the Court to enter final judgment for the sum due it with the assertion it is extremely concerned of Pensacola's financial position. In part, it bases such concern on statements made by counsel for Pensacola in these proceedings that if it owes monies to Tyger, it will pay it, and statements made after the Court's ruling on the motion for summary judgment to the effect that Pensacola does not have the wherewithal to pay the said sum. In its discussion and opposition to the entry of a final judgment, the Court suggested that entry of final

judgment on plaintiff's claim would be delayed if Pensacola would post a bond or furnish other assurance for payment of the $2,790,000.00. Pensacola has advised it does not wish to do so.

There is no dispute that Tyger advanced the funds for which it seeks reimbursement in 1987. And, there is no dispute that the joint venture sustained a substantial loss on the project.

Entry of final judgment on Tyger's claim will enable it to initiate the process for collection of the award already made. Delay in being able to execute on the judgment may result in serious economic prejudice to Tyger. *See Curtiss-Wright Corporation v. General Electric Company,* 446 U.S. 1, 100 S.Ct. 1460 (1980). Giving mature consideration to the facts and circumstances of this case and the high probability of prejudice to Tyger from any delay, and considering the equities of the case, and lack of any just reason offered or suggested against it, and the Court being of the opinion that there are no just reasons to delay the entry of final judgment on Tyger's claim, the Clerk is directed forthwith to enter final judgment in favor of Tyger against Pensacola for $2,790,000.00 with interest and costs. The Court is of the opinion that regardless of the disposition of the counterclaim and accounting, there is little likelihood that the outcome of counterclaim action could or would affect the plaintiff's claim, or that an appeal on the counterclaim could or would involve the summary judgment claim.

Copy of this Order is forwarded to counsel.

Richard B. Kellam
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 30th, 1989

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

TYGER CONSTRUCTION CO., INC., etc.

V.

PENSACOLA CONSTRUCTION CO.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88-185-NN

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Tyger's Motion for Summary Judgment is GRANTED and that Tyger shall recover $2,790,000 and, the Court finding there is no just reason for delay, the Clerk is directed, pursuant to Rule 54(b), to enter final judgment in that amount forthwith.

Date *(By) Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

TYGER CONSTRUCTION
COMPANY
INCORPORATED, etc.,

Plaintiff,

Civil Action
No. 88-185-NN

v.

PENSACOLA CONSTRUCTION
CO.,

Defendant.

OPINION AND ORDER

This matter came on for hearing on June 8, 1989 on plaintiff's (1) motion to dismiss Counts I and II of defendant's first amended counterclaim; (2) motion for summary judgment; and on defendant's (1) motion for appointment of a special master; (2) motion to shorten the time in which plaintiff must answer interrogatories; (3) motion for leave to file a second amended counterclaim; (4) motion for extension of the discovery cut-off date; (5) motion to increase the number of non-party depositions; (6) motion to compel production of documents and sanctions; (7) motion for a continuance; and (8) countermotion for summary judgment. After hearing the arguments of counsel the Court denied defendant's eight (8) motions leaving for disposition only plaintiff's motion to dismiss Counts I and II of defendant's first amended counterclaim and motion for summary judgment.

BACKGROUND

During the months of June and July of 1985, representatives of Tyger Construction Company, Inc. (Tyger) and Pensacola Construction Company (Pensacola) met for the purpose of putting together a bid to construct, among other things, two sand islands in the James River at Newport News, Virginia as part of the Virginia Department of Highways and Transportation (VDOT) Interstate 664 bridge-tunnel project. After being awarded the contract by VDOT the parties entered into a joint venture agreement (the "Agreement") on August 15, 1985. The Agreement provided that Tyger would have a sixty percent (60%) interest in the joint venture, Pensacola a forty percent (40%) interest, and Tyger would be responsible for the day-to-day operating decisions for the project and for advising Pensacola on the progress of the project. The Agreement further provided that:

> All working capital shall be furnished immediately by each Partner, in accordance with the foregoing percentages upon request of the Managing Partner, with the approval of the Management Committee.

Fred Butler, Tyger's President, was appointed Managing Director of the venture and Chairman of the Management Committee (but without vote). The voting members of the Management Committee were J.P. Silvestri, Jr., an officer of Tyger[1], and Kerry E. Reardon, Pensacola's President. The Agreement specifies that all actions of the Management Committee shall be taken by majority vote of members present at a duly held meeting, or by written consent

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[1] Mr. Silvestri has since left the employ of Tyger.

of each member (or his alternate).[2] A duly held meeting required that all members receive reasonable notice of the time and place of the meeting and that at least two members (or their alternates) be present.

Since work began on the project in 1985 Pensacola has made five capital contributions totalling $3,660,000: (1) $100,000 on September 1, 1985, (2) $400,000 on November 13, 1985, (3) $400,000 on March 15, 1986, (4) $960,000 on December 12, 1986 and (5) $1,860,000 in April of 1987. Each contribution was made in accordance with Pensacola's 40% share and at the request of Tyger but without the formal approval of the Managing Committee as called for in the Agreement. On July 10, 1987, Tyger requested that Pensacola contribute capital to the Joint Venture, in accordance with its 40% share, in the amount of $2,340,000. This request was refused causing Tyger to increase its capital contribution to cover the amount requested of Pensacola. Tyger instituted this action claiming that $2,540,000 is due from Pensacola in order to bring its capital contribution in line with its 40% share.[3] In addition, Tyger seeks to recover $450,000 in default

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[2] The agreement makes no provision for a tie vote among committee members even though the Chairman or his alternate have no vote.

[3] Tyger does not explain the $200,000.00 difference between this figure and the July 20, 1987 request for capital contribution. The record does not indicate whether any request was made of Pensacola for this additional $200,000.00 capital contribution. The Court will therefore confine its consideration to the $2,300,000.00 requested contribution and the interest owing thereon.

interest which has accrued on the unpaid capital contribution as provided by the Agreement.

Pensacola, in its answers to Tyger's requests for admissions and in its response to Tyger's motion for summary judgment, contends that it refused to make the requested $2,300,000 capital contribution because Tyger failed to follow the procedures set forth in the Agreement for capital requests. Tyger acknowledges that the procedure was not followed but counters that the procedure was never followed and that Pensacola nevertheless made five capital contributions totalling $3,660,000 upon the written and sometimes oral request of Tyger officials. Tyger also points out that, at the time the $2,300,000 capital request was made Pensacola did not raise an objection to the procedures followed in making the request. Tyger argues that this course of conduct between the parties concerning the first five capital contributions modified the terms of the Agreement and estops Pensacola from relying on the capital request procedures set forth therein.

By early 1987 it had become clear that the Joint Venture would sustain large losses performing the contract with VDOT. The project which was originally bid at $42,000,000[4] was completed and accepted by VDOT in September of 1987 at a cost of approximately $57,000,000 producing a total net loss of roughly $15,000,00.[5] In its

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[4] The parties estimated that the project would cost approximately $37,000,000.00 to complete leaving a profit of roughly $5,000,000.00.

[5] These figures are taken from the Coopers & Lybrand audit submitted to Tyger and Pensacola on February 15, 1989 and

first amended counterclaim Pensacola alleges that prior to bid Tyger made numerous misrepresentations of material fact concerning the manner in which the work would be performed (i.e., the amount and type of equipment which would be used) and the maximum accounting and bookkeeping costs to be charged to the joint venture during the performance of the project. Pensacola also alleges that after the contract was awarded Tyger: (1) concealed important information concerning the project's progress and financial condition, (2) improperly attempted to renegotiate with suppliers and subcontractors to lower their pre-bid firm price quotation (a practice known as "buying out" the supplier or subcontractor), (3) failed to enter into contracts with suppliers and subcontractors on terms favorable to the Joint Venture, (4) failed to properly manage equipment, materials and personnel in performance of the work, and (5) misrepresented the availability of a supplier of sand. Based on these alleged acts and omissions Pensacola seeks to recover under theories of breach of fiduciary duty (Count I) and misrepresentation (Count II). Tyger has moved to dismiss Count I on the ground that the alleged acts and omissions complained of do not state a claim for breach of fiduciary duty, and Count II on the ground that the alleged misrepresentations were nothing more than promises relating to future action.

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attached as Exhibit E to Tyger's Rebuttal Brief in Support of its Motion for Summary Judgment and in Opposition to Defendant's Counter-Motion for Summary Judgment. The figures indicate the position of the joint venture as of December 31, 1988.

DISCUSSION

BREACH OF FIDUCIARY DUTY (Count I)

The parties agree that by entering into the Joint Venture Agreement they assumed certain fiduciary obligations toward each other. The Agreement requires that "[e]ach Partner shall act in the highest good faith toward the other and shall cooperate with the others to the fullest extent in order that said work shall be duly, diligently and fully performed." But even absent such language in the Agreement Virginia law imposes such duties on joint venturers. In *Horne v. Holley,* 167 Va. 234, 239, 188 S.E. 169, 171-72 (1936) the Virginia Supreme Court described these duties as follows:

> The utmost good faith, the most scrupulous honesty, is exacted of each party toward the other. Each must guard the interest of his coadventurer equally with his own, and must make frank and full disclosure of all material facts. Each is regarded by a court of equity as a trustee or agent of the other with respect to the enterprise undertaken.

Id. Tyger itself points out in its brief in support of its motion to dismiss Counts I and II that its fiduciary obligations forbid any self-dealing and concealment or misrepresentation of material fact. However, Tyger contends that the allegations contained in Count I, if accepted as true, only state a claim for negligent management of the project. With three exceptions the Court agrees.

Pensacola alleges that misrepresentations were made and facts concealed concerning the availability of an adequate sand source. Paragraph 17(j) of the amended counterclaim alleges that:

> On or about July 22, 1985 [the time of bid], Tyger through Paul Silvestri told Pensacola that Tyger and its affiliated companies had secured sand sources for the Joint Venture for this project from Lone Star which had an existing quarry with existing permits which met all contractual criteria and was available and ready for use and contained sufficient quantities and at such favorable rates which would make the bid of the Joint Venture to the Owner very competitive and the cost to perform the work would be less. In fact, Tyger had not secured sand sources sufficient to supply the project.

Paragraph 19(b) alleges that after the award of the contract to the Joint Venture, Tyger was guilty of:

> Misrepresenting to Pensacola for months that there was no problem in obtaining all the sand from the source when, in fact, there was.

Pensacola also alleges at Paragraph 18(c) that:

> Correct and accurate financial information for the Project was being concealed from Pensacola.

Of the allegations made in the amended counterclaim, only these three state that existing material facts were misrepresented or concealed. The remaining allegations fall into two categories: (1) project mismanagement and (2) failure to deliver on promises of future action or outcome. Pensacola does not allege, nor could it, that Tyger mismanaged the project for its own gain. Tyger is responsible for 60% of the $15,000,000.00 loss sustained on the project. Tyger may very well have mismanaged the project, but mismanagement absent bad faith or self-dealing does not constitute a breach of fiduciary duty. The allegations concerning future action or outcome are

primarily concerned with the manner in which the construction would be performed. The fact that changes were made in the original construction plan is neither surprising nor a breach of fiduciary duty.

MISREPRESENTATION (Count II)

Pensacola realleges the allegations contained in Count I to support is claim of misrepresentation in Count II. Therefore, Count II, like Count I, will be limited to the three allegations set out above.

TYGER'S MOTION FOR SUMMARY JUDGMENT

The first question the Court must pass upon in reviewing Tyger's motion for summary judgment is whether Pensacola's failure to object on five separate occasions to the non-observance of the capital request procedures set out in the Agreement estops it from relying on those procedures to justify its decision not to make the $2,300,000.00 capital contribution requested on July 20, 1987. In its simplest sense the doctrine of estoppel is a means of preventing a party from asserting a legal claim or defense which is inconsistent with his prior action or conduct. *Employers Commercial Union Insurance Co. v. Great American Insurance Co.*, 214 Va. 410, 200 S.E.2d 560, 563 (1973). Whether estoppel arises in any case is ordinarily a question to be determined by the trier of fact at trial. *See Tidewater Equipment Co., Inc. v. Reliance Ins. Co.*, 650 F.2d 503, 506 (4th Cir. 1981) (applying Maryland law). *See also Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745 (1955); *Employees Assur. Soc. v. Bush*, 105 Ga. App. 190, 123 S.E. 2d 908 (1962). However, where the

facts are not in dispute or where there is only one reasonable inference which can be drawn from the facts, it becomes a question of law. *See Highlands Ins. Co. v. Allstate Ins. Co.*, 688 F.2d 398, 404 (5th Cir. 1982) (applying Mississippi law). *See also In re Metropolitan Intern., Inc.*, 616 F.2d 83, 86 (3d Cir. 1980) (applying Pennsylvania law); *Hicks v. Home Sec. Life Ins. Co.*, 226 N.C. 614, 39 S.E. 2d 914 (1946). Here the facts are not in dispute, Pensacola alleges and Tyger admits that the procedures set out in the Agreement for capital calls were not followed when the July 20, 1987 capital request was made or for any of the previous five capital requests. Nevertheless, Pensacola admits in its answers to Tyger's requests for admissions that it honored the first five requests. Accordingly, the question of whether Pensacola's actions raise an estoppel can be determined as a matter of law.

Addressing the question of estoppel in the context of a contract dispute the Virginia Supreme Court in *Stanley's Cafeteria, Inc. v. Abramson*, 226 Va. 68, 306 S.E.2d 870, 873 (1983), held that:

> [A] course of dealing by contracting parties, considered in light of all the circumstances, may evince mutual intent to modify the terms of their contract. . . . But the circumstances surrounding the conduct of the parties must be sufficient to support a finding of a "mutual intention" that the modification be effective (cites omitted), and such intention must be shown by clear, unequivocal and convincing evidence, direct or implied (cites omitted). And when one party claims that the other party has surrendered a right guaranteed by the contract, the party asserting such modification must

> prove either passage of valuable consideration estoppel *in pais*, or waiver of the right.

Id. See Atlantic Coast Line v. Bryan, 109 Va. 523, 65 S.E. 30 (1909). The elements necessary to establish estoppel *in pais* or equitable estoppel, absent a showing of fraud or deceit, are (1) a representation, (2) reliance, (3) change of position and (4) prejudice. *Lataif v. Commercial Indus. Const., Inc.*, 223 Va. 59, 286 S.E.2d 159, 161 (1982). *See also T . . . v. T . . .*, 216 Va. 867, 873, 224 S.E.2d 148, 152 (1976). Here, the "representation" took the form of a course of conduct between the parties with respect to capital contributions. On five occasions when Tyger requested capital contributions, Pensacola honored the request without once raising an objection to the procedure followed. It does not even appear that such an objection was raised at the time of the July 20, 1987 request. The case law makes clear that a "representation" can take the form of a course of conduct. *See Creteau v. Phoenix Assurance Company of New York*, 202 Va. 641, 119 S.E.2d 336, 339 (1961) where the Court said: "A convenantor may by his conduct so lull his covenantee into security as to estop himself from the exercise of a right for which he had contracted."

As for the elements of reliance and change of position it appears clear that after five requests for capital were honored without objection Tyger reasonably concluded that the formal request procedures set out in the Agreement need not be strictly adhered to when it made the June 20, 1987 request. It is also clear that by relying on the previous course of dealing and not adhering to the Agreement's capital request procedures Tyger has been

prejudiced. Had a timely objection been raised by Pensacola Tyger could have sought the approval of the Management Committee for its request. Also, Tyger was forced to contribute Pensacola's 2.3 million dollar share in order to keep the project going and avoid a breach of the Joint Venture's contract with VDOT.

The Court concludes that Tyger has met its burden of proof with regard to the elements of estoppel by "clear, unequivocal and convincing evidence" and therefore Pensacola may not oppose Tyger's motion for summary judgment on the ground that the capital request procedures set forth in the Agreement were not followed.

Pensacola next argues that summary judgment cannot be granted unless Tyger proves that the expenses which necessitated the capital call were properly incurred under the Agreement. The Court disagrees. Questions concerning the propriety of expenses incurred in the course of the project are better left for resolution at the time of accounting and dissolution of the Joint Venture. Tyger, which put up the money necessary to complete the project thereby saving the Joint Venture further losses for breach of the VDOT contract, should not have to await the completion of the accounting before it can recover the $2,300,000 contribution made on behalf of Pensacola. Therefore, summary judgment is granted with respect to this amount and $450,000 in default interest which has accrued thereon as provided by the Agreement.

CONCLUSION

Counts I and II of Pensacola's first amended counterclaim are **DISMISSED**, except with respect to the three allegations set forth above. Tyger's motion for summary judgment is **GRANTED** and Tyger shall recover of Pensacola $2,750,000.00 which includes the requested $2,300,00.00 [sic] capital contribution now in default, and $450,000.00 in interest accruing thereon as provided by the Agreement.

Copies of this Opinion and Order are forwarded to counsel.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June , 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

TYGER CONSTRUCTION COMPANY, Plaintiff,	]	CIVIL ACTION
v.	]	NO. 88-185-NN
PENSACOLA CONSTRUCTION CO., Defendant.	]	

MEMORANDUM ORDER

This matter is before the Court on defendant's motion to dismiss count two of plaintiff's complaint, and plaintiff's motion to dismiss defendant's counterclaim. For the reasons hereinafter stated defendant's motion to dismiss is DENIED and plaintiff's motion to dismiss is GRANTED with leave to defendant to amend its counterclaim within 15 days from the date of this Order.

Tyger Construction Company, Inc. (Tyger) and Pensacola Construction Co. (Pensacola) entered into a joint venture agreement on August 15, 1985, to construct certain increments of the bridge-tunnel across the James River for I-664.

The complaint here filed by Tyger alleges that Pensacola has failed to contribute its contract share (40%) of the capital required for the construction, the shortage being, according to the complaint, the sum of

$2,340,000.00. The complaint is couched in two counts, the first count on breach of the written contract, and the second count on breach of a quasi contract.

Pensacola, defendant, has answered with a three count counterclaim. Count one appears to allege negligence, breach of the joint venture contract, breach of fiduciary obligations, and fraud. In truth, the counterclaim language is redundant, conclusive and repetitive so as to obscure whether claims of mismanagement are founded on negligence, on the one hand, or whether stated as they are in general terms, are intended to be only evidence of breach of fiduciary duties and fraud.

In any event, we deem it necessary to set this litigation on a course in which the issues are clearly stated and can be recognized. To that end, the plaintiff's motion to dismiss the defendant's counterclaim is GRANTED, with leave to amend within 15 days from the date of this Order.

It is generally accepted in Virginia that the relationships and duties of joint venturers and partners, toward one another, are essentially the same. *Burrus v. Green Auction And Realty Company, Inc.*, 228 Va. 5, 319 S.E.2d 725, 727 (1984). Additionally, the general rule is that one partner cannot maintain an action against a copartner for transactions arising out of the partnership unless there has been an accounting upon dissolution, or settlement. 59A American Jurisprudence 2d, §§ 560, 562; *See Savings & Loan Corporation v. Bear*, 155 Va. 312, 154 S.E. 587, 596 (1930). The proper remedy is by way of an action for accounting and dissolution. 14A Michie's Jurisprudence, Partnership, § 62. However, an action will lie by one

partner against a copartner for breach of fiduciary duties, outside the general rule requiring that all actions on partnership relations follow a general accounting of the parties interests. *Ferguson v. Williams*, 670 S.W.2d 327, 331 (Tex. App. 1984); 59A American Jurisprudence 2d, § 623.

Accordingly, any amended counterclaim, if offered, is to omit charges of negligence, which are improper in suits between partners with reference to the partnership agreement. Any charges of breach of fiduciary duty must be sharply defined. Any mismanagement averments, where relied on as breaches of fiduciary duties, must be pled with particularity. Additionally, if fraud remains a precept in any new counterclaim, it shall be spelled out as to who, where, how and when.

The defendant's motion to dismiss count two of the complaint is DENIED. Such count, moving away from the strict contract pleading in count one, is an alternative pleading, which, if proved by competent admissible evidence, may be proper. *See McIntosh v. Magna Systems, Inc.*, 539 F.Supp. 1185, 1190-91 (N.D. Ill. 1982); Fed. R. Civ. P. 8(e)(2). The plaintiff concedes that count two is an alternative pleading and that it is entitled to recover only once. Accordingly, count two remains.

It is so ORDERED.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
March 23, 1989.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
March 25, 1991

No. 89-2433

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually and for the use and benefit of Tyger-Pensacola Joint Venture

Plaintiff - Appellee

v.

PENSACOLA CONSTRUCTION CO., a Delaware Corporation

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Sprouse and Judge Wilkins.

For the Court,

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 2, 1994

No. 92-2502
CA-88-185-NN

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation individually and for the use and benefit of Tyger-Pensacola Joint Venture

Plaintiff – Appellant

v.

PENSACOLA CONSTRUCTION COMPANY, a Delaware Corporation

Defendant – Appellee

No. 92-2503
CA-88-185-NN

TYGER CONSTRUCTION COMPANY INCORPORATED, a South Carolina Corporation, individually and for the use and benefit of Tyger-Pensacola Joint Venture

Plaintiff – Appellee

v.

PENSACOLA CONSTRUCTION COMPANY, a Delaware Corporation

Defendant – Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

No. 94-783

Supreme Court, U.S.
FILED
NOV 29 1994
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1994

PENSACOLA CONSTRUCTION CO.,

Petitioner,

v.

TYGER CONSTRUCTION COMPANY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred in reversing and remanding with instructions to vacate certain portions of a jury verdict by holding that the trial judge abused her discretion in admitting opinion testimony of a qualified expert where his opinions were highly speculative, conjectural, without factual support in the record and in direct conflict with facts in evidence.

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ADDITIONAL PROVISIONS INVOLVED

In addition to the provisions cited by the petitioner, the following provisions are also involved in this case:

FEDERAL RULE OF EVIDENCE 403:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FEDERAL RULE OF EVIDENCE 702:

Testimony of Experts. If scientific, technical, or other specialized knowledge will assist the

trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

The petition for writ of certiorari before the Court is the final chapter in a series of protracted litigation between the petitioner, Pensacola Construction Co. ("Pensacola"), and its joint venturer, Tyger Construction Company, Inc. ("Tyger"). The joint venture was formed in August, 1985 to perform a construction contract for the Virginia Department of Highways and Transportation. The principal work of the contract was the construction of two sand islands as part of a bridge-tunnel across the James River at Newport News, Virginia.

Although the parties have litigated a variety of issues related to the joint venture beginning in December, 1988, the instant petition stems from a second

trial of Pensacola's counterclaim alleging that Tyger misrepresented that a particular source of sand for the project, the "Waitman tract," was available and permitted for mining. In fact, the joint venture was unable to use the Waitman tract. Pensacola sought to prove through its only expert witness, H. B. McCoy, that the joint venture incurred additional costs of $9,799,474.00 as a result of the unavailability of the Waitman tract. McCoy arrived at this figure by calculating costs in seven specific categories. Pensacola sought recovery of 40% of this amount, $3,919,790.00, based on its 40% interest in the joint venture.

At a deposition prior to trial, McCoy explained in detail the opinions he was prepared to render at trial on

damages. Once Tyger fully understood his calculations, it filed an extensive motion in limine arguing that McCoy's calculations and theories had no basis in fact. In denying the motion, the trial judge stated:

> In terms of the fact basis, as a general matter, I'm of the opinion that Rule 705 will allow an expert, once they are qualified -- and I think that is a threshold area for any expert -- once an expert qualifies in a particular field, I think that the Court and the jury can consider any opinion that the expert renders. I believe that if an expert doesn't have an adequate fact basis for that opinion, that is a matter to be brought out on cross-examination.
>
> That is your role as an advocate, and then it is your role as an advocate to argue to a jury that this opinion is not properly based in fact, it should not be given much weight by the jury, if any at all. And I think that basically where you say that there are fallacies in the

> analysis and fallacies in the reasoning process and in the bases, that those are matters for cross-examination and argument. I make that a general ruling in regard to what you said.

(J.A., Vol. IV, 1372) (Emphasis added).

The trial court subsequently qualified McCoy "in assessing costs, expenses and losses in projects such as the one in issue in this lawsuit and the preparation of estimates and the review of cost accounting reports, and in the analysis of construction methods for projects such as at issue in this lawsuit." (J.A., Vol. VI, 1795). Consistent with her view that, once qualified, the jury could consider "any opinion that the expert renders," the trial judge permitted McCoy to testify freely to all of his calculations and left it to Tyger to defuse McCoy's

testimony through cross-examination and Tyger's own evidence. Tyger renewed its objections to McCoy's testimony by moving for a directed verdict at the conclusion of Pensacola's evidence (J.A., Vol. VI, 1935-45) and again at the conclusion of all the evidence (J.A., Vol. VII, 2309-67).

The jury was required to return its verdict on a special interrogatories verdict form calculating damages in each of the seven categories. A comparison of McCoy's calculations and the jury's award is as follows:

	(McCoy Calculation)	(Jury Award)
1. Move to Hula/Chisman	$1,187,231	$ 977,083
2. Additional Barge Costs	839,222	279,740
3. Increased Costs of Mining an Uneconomical Sand Pit	3,043,020	1,268,448
4. Excessive Supervisor Salaries at Sand Pit	86,260	90,543
5. Excessive DBE Fee Paid for Move to Different Pit	63,297	38,866
6. Increased Costs Due To Excessive Time	4,438,794	1,270,122
7. Excessive Costs Due To Subcontract to Great Lakes	41,650	20,825
TOTAL	$9,799,474	$3,945,627
	x.40	x.40
	$3,818,790	$1,578,250

(J.A., Vol. VIII, 2564, 2596-97).

Tyger appealed four of the seven categories of the jury's award (item nos. 3-6 above) to the Fourth Circuit Court of Appeals on the ground that the trial judge abused her discretion in admitting McCoy's testimony on these calculations.

Tyger argued that simply because an expert qualifies in a given field does not mean that "any opinion" of that expert arguably within his field of expertise is admissible. Rather, Tyger argued, where the testimony of the expert or other evidence reveals that the expert's opinion has no basis in fact and is based purely on unsupported hypotheses or conjecture, it is the duty of the trial court not to admit the opinion testimony into evidence.

The Court of Appeals agreed. It examined the record in the case focusing on the single issue of "whether McCoy's testimony had any basis in fact." (App. 13).[1] The Court of Appeals found that

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[1] References to the Appendix filed with Pensacola's Petition for Writ of Certiorari are denoted "(App. ___)."

each of the challenged calculations were wholly unsupported by the factual record and that the trial judge abused her discretion in admitting any of the calculations into evidence. Said the Court:

> Scrutiny of expert testimony is especially proper where it consists of "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." . . . . This is particularly true, in a situation such as this, when an expert has apparently taken factual data from the specific project in dispute, and formulated estimates of damages. Without accurate factual support, the damages calculations were speculative and the district court abused its discretion in allowing McCoy's testimony in the areas discussed above.

(App. 19-20) (citations omitted).

Significantly, the Court of Appeals addressed and distinguished its earlier

decision of Clinchfield R.R. v. Lynch, 784 F.2d 545 (4th Cir. 1986) relied upon by Pensacola. In Lynch, the court affirmed the district court's admittance of an expert's "novel" opinion stating that "[a] court should not exclude expert testimony simply because it involves a new method or novel theory." Id. at 554. The court also noted in Lynch that Federal Rule of Evidence 703 permits an expert to base his opinion testimony on facts or data which need not be admissible in evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Id. at 553.

The Court of Appeals in the instant case distinguished Lynch noting that

while the expert's methods were novel in Lynch,

> [h]ere, we have an expert espousing an opinion based on assumptions which find no support in the record. Although McCoy's methods are unusual, the greater danger is that the jury may accept as fact not just the faulty assumptions on which he relied, but may also accept the conclusions that are drawn through his use of these assumptions. When the assumptions made by an expert are not based on fact, the expert's testimony is likely to mislead a jury, and should be excluded by the district court.

(App. 18).

At page 11 of its Statement of the Case, Pensacola asserts that the Court of Appeals made four "implicit and explicit" erroneous holdings. A fair reading of the court's opinion reveals, however, that Pensacola's assertions are untrue.

First, contrary to Pensacola's contention, the Court of Appeals did not

hold that the basis for an expert's opinion must be set forth in the evidence. Indeed, as the court stated, Federal Rule of Evidence 703 provides that the facts and data forming the basis for an expert's opinion "need not be admissible." (App. 18).

Similarly, the Court of Appeals did not hold, as Pensacola asserts, that Pensacola bore the burden of setting forth a factual basis for its expert's conclusions or that whether an expert's conclusions are adequately supported by the evidence in the case is a matter going to the admissibility of, rather than the weight to be given to, the expert testimony.

Rather, the Court of Appeals' holding stands for a single proposition: expert testimony that has no basis in

fact but is instead based on speculation and conjecture (regardless of whether its proponent has attempted to establish a factual basis in its case in chief or whether the lack of a factual foundation is demonstrated through cross-examination), should not be admitted into evidence. As will be demonstrated below, this decision is in accord with the Federal Rules of Evidence and the decisions of this Court and the various courts of appeals construing those rules.

ARGUMENT

A. THE DECISION BELOW IS IN ACCORD WITH THE FEDERAL RULES OF EVIDENCE AND DECISIONS CONSTRUING THE RULES.

Pensacola's first argument in support of a writ of certiorari is that "there is confusion and sharp disagreement among the appellate courts"

over whether the "reasonableness" of an expert's conclusions should be determined by the trial judge in deciding whether to admit expert opinion testimony or whether the issue of reasonableness is a matter of weight to be determined by the jury. Pensacola characterizes the decision below as in accord with the "minority view." This argument stems from a fundamental misreading of the Court of Appeals' decision.[2]

First, Pensacola asserts that the Court of Appeals placed "the burden of setting forth the reasonableness of the basis for an expert's opinion on the

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[2] The argument is also misplaced because all but one of the cases cited by Pensacola for the "majority view" were decided prior to this Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S.Ct. 2786 (1993), discussed below.

party producing the expert." Petition at 13. This is simply not the case. Nowhere in the Court of Appeals' decision is there a finding that Pensacola had the burden of adducing factual evidence supporting a determination of reasonableness. Similarly, nowhere did the Court of Appeals "require the disclosure of the basis for an expert's opinion as a requirement to its admission." Petition at 15.

To the contrary, the Court of Appeals simply held that once a qualified expert's methodology and basis for his opinion are made known to the trial judge, either through the proponents' own evidence, cross-examination, or proffer outside the hearing of the jury, and upon an objection to the expert's opinion as lacking a rational basis or employing an

unreliable methodology, the trial judge must make a determination whether to admit or refuse the testimony. A trial judge may not, as she did here, simply let the jury "consider any opinion that the expert renders." J.A., Vol. IV, 1372. The trial judge must resist "the temptation to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it 'the weight it deserves.'" Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 569 (D.C. Cir. 1993) (quoting In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1233 (5th Cir. 1986)).

If the trial judge does not resist such temptation, appellate scrutiny, as in the instant case, is required. As the Fifth Circuit aptly stated in Air Crash Disaster:

> [W]e adhere to the deferential standard for review of decisions regarding the admission of testimony by experts. Nevertheless, we take this occasion to caution that the standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a "let it all in" philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials.

Id. at 1234.

In this case, the Court of Appeals undertook the scrutiny that the trial court determined it could forego. In so doing, the Court of Appeals analyzed the entire record and found that McCoy's opinions were "based on faulty assumptions," "not based on fact," and "speculative in nature." (See App. 15, 17, 18, 20).

The Court of Appeals' ruling that opinion testimony so lacking in a reasonable, factual basis should not be admitted is consistent with what has long been the law in the Fourth Circuit. See Cunningham v. Rendezvous, Inc., 699 F.2d 676, 678 (4th Cir. 1983); Eastern Auto Distributors of America, Inc., 795 F.2d 329, 338 (4th Cir. 1986). The ruling is also in harmony with numerous statements from other circuits. See, e.g. Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 568-70 (D.C. Cir. 1993) (excluding testimony based solely on guesswork, speculation and conjecture); U.S. v. L.E. Cooke Co., 991 F.2d 336, 342 (6th Cir. 1993) (where expert's testimony amounts to mere guess or speculation, court should exclude testimony; opinion with reasonable factual basis should not be

excluded); Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1127 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1280 (1992) (if record establishes a critical fact contrary to the expert's testimony, or if court may take judicial notice of fact that fatally contradicts assumption of expert, then testimony should be excluded); Coal Resources, Inc. v. Gulf & Western Industries, 865 F.2d 761, 772 n. 4 (6th Cir. 1989)(liberalization under F.R.E. 703 of type of information on which expert may base opinion has not eliminated requirement that expert ground opinion on reliable data rather than pure speculation); Jones v. Otis Elevator Co., 861 F.2d 655, 662 (11th Cir. 1988)("relevant testimony from a qualified expert is admissible only if

the expert knows of facts which enable him to express a reasonably accurate conclusion as opposed to conjecture or speculation"); In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1231-35 (5th Cir. 1986) (opinions of expert should not have been admitted where assumptions were "so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis" for calculating damages).

In sum, the trial judge in the instant case did not understand her role in determining the admissibility of expert opinion evidence. She mistakenly ruled that a trial court's inquiry concludes with a determination that a witness qualifies as an expert.

As recognized by various courts of appeals, and as explained more fully by

this Court recently in Daubert, discussed below, a trial judge must go beyond the issue of qualification. The Court of Appeals in this case performed the task which the trial judge declined to undertake. Its decision is in accordance with the Federal Rules of Evidence and should not be reviewed.

B. THE DECISION BELOW IS IN ACCORD WITH DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC.

Pensacola next argues that the Court of Appeals' decision conflicts with this Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S.Ct. 2786 (1993). As with Pensacola's other arguments, this position is not well-taken.

In Daubert, this Court granted certiorari "in light of sharp divisions

among the courts regarding the proper standard for the admission of expert testimony." Id. at 2792. While noting that the Federal Rules of Evidence embody a "general approach of relaxing traditional barriers to 'opinion' testimony," id. at 2790 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988)), the Court also emphasized that "the Rules of Evidence -- especially Rule 702 -- assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert, 113 S.Ct. at 2799.

Thus, Rule 702 permits an expert to testify only when "scientific, technical, or other specialized knowledge will assist the trier of facts to understand

the evidence or to determine a fact in issue." F.R.E. 702 (emphasis added). "The word 'knowledge' connotes more than subjective belief or unsupported speculation." Daubert, 113 S.Ct. at 2795. Accordingly, said this Court, expert testimony must meet "a standard of evidentiary reliability." Id.[3] In determining reliability, it falls to the trial judge to undertake "a preliminary assessment of whether the reasoning or methodology underlying the testimony is

---

[3] The Court in Daubert limited its discussion of the admissibility of expert testimony to scientific matters. A number of courts, however, have applied its rationale in rejecting non-scientific expert testimony. See, e.g., Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1844 (1994); Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993); Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (D.C. Cir. 1993); Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994); O. L. McLendon v. Georgia Kaolin, 841 F. Supp. 415 (M.D. Ga. 1994).

scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 2796.

Here, the trial judge eschewed her duty of making any preliminary assessment, allowing every utterance of the expert to be evaluated by the jury. This, the Court of Appeals correctly noted, was abuse of discretion. See Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183, 186-87 (7th Cir. 1993).

In addition to being reliable, Rule 702 also requires that the evidence or testimony be relevant, i.e., that it "assist the trier of fact to understand the evidence or to determine a fact in issue." F.R.E. 702; Daubert, 113 S.Ct. at 2795. Additionally, the expert testimony must be "sufficiently tied to

the facts of the case that it will aid the jury in resolving a factual dispute." Id. (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).

In the case at bar, the Court of Appeals did not reference Rule 702 or the Daubert decision. However, it found the assumptions made by McCoy "not based on fact" and "likely to mislead a jury." (App. 18). Without specifically saying so, the Court of Appeals correctly found McCoy's opinions not sufficiently tied to the facts of the case and therefore not relevant.[4]

---

[4] Even had the trial court determined McCoy's opinions to be relevant, upon Tyger's objections to admissibility and pursuant to F.R.E. 403, it should have weighed the probative value of the testimony against any danger of misleading or confusing the jury to determine if the testimony should have been excluded. See, e.g., American Bearing Co. v. Litton Industries, 729 F.2d 943, 949 n. 14 (3d Cir. 1984). The trial court made no analysis.

In sum, Federal Rules of Evidence 403 and 702, among others, required the trial judge to scrutinize more than Mr. McCoy's credentials for qualification. As the Court of Appeals opinion makes amply clear, had the judge followed Tyger's repeated urging and probed the methodology and bases of McCoy's opinions, she would have discovered rank speculation and wholly unsupported assumptions.

The Court of Appeals' decision to reverse the judgment against Tyger for abuse of discretion is consistent with the Rules of Evidence and this Court's opinion in Daubert. Tyger respectfully submits that for this reason, too, the petition should be denied.

C. THE DECISION BELOW DOES NOT VIOLATE THE SEVENTH AMENDMENT GUARANTEE OF TRIAL BY JURY.

Continuing its misconstruction of the decision below, Pensacola last argues that the Court of Appeals' decision violated Pensacola's Seventh Amendment right to trial by jury. It bases this argument on a fundamental misunderstanding between the admissibility of expert testimony (a decision for the court) and the weight to be given such testimony once it is admitted (a decision for the finder of fact). At pages 26-27 of its petition, Pensacola confuses this critical distinction and erroneously suggests that the Court of Appeals' decision requires trial courts to weigh opinion testimony against other evidence to determine admissibility.

No such inference can be drawn from the decision below. As previously explained, the Federal Rules of Evidence provide the framework governing the admissibility of expert opinion testimony. This Court in Daubert provided clarification and additional considerations for courts to follow in determining questions of admissibility.

Pensacola's central theme seems to be nothing more than an attempt to support the trial court's erroneous ruling that it was the jury's function to determine the reliability of a qualified expert's methodologies, hypotheses and factual bases. As Daubert and the myriad of court decisions discussing the admissibility of expert testimony point out, this proposition is not so.

The trial judge serves as "gatekeeper," Daubert, 113 S.Ct. at 2798, assuring, among other things, that an expert is qualified, that the methodologies he employs are reliable, and that his testimony is relevant. The decision of the Court of Appeals in the instant case does no more than emphasize the trial court's abdication of these responsibilities by performing the analysis which should have been undertaken by the trial judge. The Court of Appeals' analysis points out the numerous and serious deficiencies in the underpinnings of McCoy's opinions. Accordingly, the decision of the Court of Appeals was correct and should stand.

CONCLUSION

Pensacola's central theme is that there is controversy among federal courts of appeals regarding the proper procedure for admitting expert testimony. Yet this Court in Daubert, a decision just over a year old, addressed in detail the proper standards for admission of expert testimony. The decision of the Court of Appeals is in accord with Daubert and the Federal Rules of Evidence. Accordingly, the Petition before the Court presents no issues which this Court, in its discretion, need review. Thus, respondent respectfully requests that certiorari be DENIED.

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In The

Supreme Court of the United States

October Term, 1994

PENSACOLA CONSTRUCTION CO.,

Petitioner,

vs.

TYGER CONSTRUCTION COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In its Brief in Opposition, Tyger Construction Co. has misrepresented both the actions taken by the trial judge and the opinion issued by the Fourth Circuit in this case.

Tyger states that the trial judge held that a jury may consider "any opinion that the expert renders," if the expert is properly qualified. This statement is taken so far out of context that it totally distorts beyond recognition the ruling by the trial court. The trial judge at the time this opinion was rendered was ruling on Tyger's Motion in Limine to exclude expert testimony. The essence of the ruling by the trial court was that judgment on the qualifications of Pensacola's experts would be reserved until trial and that the objections of Tyger concerning alleged deficiencies in the conclusions of the experts were appropriate subjects for cross-examination and not a Motion in Limine. (J.A. 1273-79, 1372-73). The trial judge's preliminary holding on the question of expert testimony is set forth in the Appendix, pp. 42-48. As seen in that excerpt, Judge Smith did not abandon, as Tyger mistakenly asserts, "her duty of making any preliminary assessment, allowing every utterance of the expert to be evaluated by the jury." The ruling by the trial court on the Motion in Limine was in accord with Federal Rule of Evidence 705.

Similar to the misrepresentation of the trial judge's actions, Tyger further misrepresents the Fourth Circuit's opinion. In its opinion the Fourth Circuit clearly, but contrary to the law, weighed the evidence in the case for the purpose of determining whether the expert's testimony was admissible. The Fourth Circuit determined that the opinion of Pensacola's expert was unfounded. This

determination was reached even though the Fourth Circuit noted that the figures for the expert's conclusions were derived from numerous documents, including: (a) the work sheet of Ken Chambless, who was the costs accountant for Tyger on the project; (b) cost reports prepared by Tyger detailing the amount the project cost for each month it over ran; (c) actual sand inventory from the Shirley pit, Eppes Island and Hula Chisman; (d) the original sand estimate for the Waitman pit; (e) daily reports; (f) summary production reports; and (g) other reports (App. 9). In spite of all of this evidence and other evidence, including personal site visits on which the expert could and did base his opinion, the Fourth Circuit independently weighed the evidence concerning the testimony of witnesses on the project as to (a) the cause of delay on the project and the existence of sand stockpiled on the project (App. 14-15), (b) the comparability of two different mines (App. 16-17), and (c) the efficiency of a mine (App. 16-18). After weighing this evidence and ignoring the substantial documentation relied upon by Pensacola's expert in performing his calculations, the Fourth Circuit erroneously chose to believe other witnesses and based on that declared that the opinions of Pensacola's expert should have been excluded. Although the Fourth Circuit cited Federal Rules of Evidence 703 and 705, the Court made no finding that the expert's testimony was not admissible under either of those rules. (App. 13). In fact, the Court's finding is contrary to Federal Rule of Evidence 705 since the Court stated:

> It was an abuse of discretion for the trial court to admit McCoy's testimony that the delays in construction were caused by a lack of, or inefficiencies in the production of, sand. **This**

> **error resulted from the trial judge's belief,** expressed at the time it denied the motion in limine as to McCoy's testimony, **that the question of whether an expert's opinion had an adequate basis in fact should be handled by opposing counsel through cross examination and in jury argument.** (Emphasis added).

The Fourth Circuit thus held that the testimony of Pensacola's expert should have been excluded not because the expert's method was unreliable, but because the court after independently weighing the evidence chose to disbelieve the conclusions reached. (App. 18). The crux of this case is that the Fourth Circuit has established an erroneous standard both of judicial review of expert testimony and admissibility of such testimony.

ARGUMENT

1. **The decision below reveals discord within and among the federal courts of appeal on the proper manner in evaluating objections to expert testimony that concern the reasonableness of the expert's conclusions rather than the reliability of the expert's methodology.**

In its brief, Tyger cites a number of opinions that purport to support the action of the Fourth Circuit in this case. However, the existence of decisions supporting the action taken by the Fourth Circuit only supports Pensacola's contention that the various courts of appeal have handed down conflicting opinions on the issues raised in Pensacola's Petition. Tyger has in no way shown how the decisions cited by Tyger can be harmonized with those cited by Pensacola. Nor is a logical harmonization of the conflicting opinions possible. Additionally, many of the decisions cited by Tyger do not support its contention

but, in effect, are the majority view espoused by Pensacola that objections concerning weaknesses to the underpinnings of an expert's conclusions go to the weight of the evidence and not its admissibility, and thus are to be decided by the trier of fact. *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662-63 (11th Cir. 1988).

2. The decision below is not in accord with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, or *Delaware v. Fernsterer.*

Tyger insinuates that the cases cited by Pensacola as representing the majority view of deciding on the admissibility of expert testimony have been displaced by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). Such an assertion is inaccurate. First, this Court in *Daubert* addressed only the issue of the admission of novel scientific evidence and the validity of the *Frye* test. *Daubert*, 113 S.Ct. at 2795, n. 8; 2799-2800 (Rehnquist, C.J. and Stevens, J., concurring in part and dissenting in part). *Daubert* also focuses on only "principles and methodology, not on the conclusions that they generate." 113 S.Ct. at 2797. Thus *Daubert*, while providing some "general observations," *see id.* at 2796, 2799-2800, does not specifically address the issues presented in this case. That is especially true since *Daubert* deals with a Motion for Summary Judgment which was granted based on expert testimony as to a prescription drug and how the Court is to deal with the reliability of such testimony when considering a Motion for Summary Judgment. It is entirely different from this case since no cross examination was involved in *Daubert*, and hence the applicability of Federal Rule of Evidence 705 was not an issue as it is here.

To the extent that *Daubert's* general observations apply to the issues presented, these general observations do not support the action taken by the Fourth Circuit in this case. In an opinion discussing at great lengths the *Daubert* decision, the Sixth Circuit Court of Appeals noted that "the *Daubert* Court has instructed the courts that they are not to be concerned with the reliability of the conclusions generated by valid methods, principles, and reasoning." *United States v. Bonds*, 12 F.3d 540, 556 (6th Cir. 1993). The court in *Bonds* went on to state that conflicting testimony concerning the conclusions drawn by experts ordinarily go to the weight of the testimony rather than its admissibility. *Id.* at 563. The Sixth Circuit then held that the trial judge did not err in refusing to consider disputes concerning the accuracy of a test in determining its admissibility. *Id.* at 564.

In another "post-*Daubert*" decision, the Third Circuit rejected the type of review to be performed by a trial judge in accessing the admissibility of expert testimony now mandated by the Fourth Circuit's opinion. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc.*, 998 F.2d 1224, 1236-1241 (3rd Cir. 1993). Similarly, the First Circuit continues to state the rule that the burden of revealing weaknesses of the basis for an expert's opinion is on the cross-examiner and that weakness in the factual underpinning of expert's opinion is a matter affecting weight and credibility to be decided by a jury. *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 19-22 (1st Cir. 1993). These opinions of the First, Third and Sixth Circuits are in accord with Federal Rule of Evidence 705, which as noted below places the burden on the cross examiner of the expert to expose the weakness and lack

of foundation or factual basis for any expert opinion which is rendered:

> **The expert may testify** in terms of opinion or inference and give reasons therefore **without first testifying to the underlying facts** or data, unless the court requires otherwise. **The expert may** in any event be **required to disclose the underlying facts or data on cross-examination.** (Emphasis added).

Notwithstanding these opinions, and Federal Rule of Evidence 705, other courts continue to publish decisions in which the sufficiency of the factual basis for an expert's conclusions are probed by the appellate court to determine admissibility. *E.g., Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567-70 (D.C. Cir. 1993). Again, the existence of these conflicting opinions on this important issue exposes the absolute need for clarification by this Court.

In addition to *Daubert* and the decisions construing it, the opinion of this Court that most directly addresses the issues presented is *Delaware v. Fernsterer*, 474 U.S. 15 (1985). *Delaware v. Fernsterer* received no comment by Tyger, even though it directly applies to the issues presented. In *Delaware v. Fernsterer* this Court ruled that alleged deficiencies in the bases for an expert's conclusions go to the weight of the evidence, and not its admissibility. Again, the decision by the Fourth Circuit is contrary to this opinion.

After noting that the Fourth Circuit's opinion is based on *Daubert* and the Federal Rules of Evidence, Tyger attempts to fit the Fourth Circuit's opinion into the *Daubert* rubric. In doing so, Tyger misstated the actions taken by the Fourth Circuit and ignored the issues raised. The essence of the opinion by the Fourth Circuit is that

the trial court abused its discretion by allowing Pensacola's expert to testify in the first instance. Again, such a position is contrary to *Daubert* where this Court, following Federal Rule of Evidence 705, would allow such testimony and placed the burden on the cross examiner as follows: "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 113 S.Ct. at 2797.

In *Daubert*, this Court then went on to set out how the trial court, not the Court of Appeals, should handle the situation where the scintilla of evidence is insufficient to support the expert testimony stating:

> Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a), and likewise to grant summary judgment, Fed.Rule Civ.Proc. 56. *Id.* at 2799.

Although the Fourth Circuit cites to Rules 703 and 705, it performs no analysis as to the application of those rules to the case before it. (App. 13). The Fourth Circuit does not hold that the facts or data relied upon by the expert were not of the type reasonably relied upon by experts, that the reasoning or methodology of the expert was invalid or not properly applicable to the facts in issue, that the testimony of the expert witness would not have assisted the trier of fact, or that the probative value of the evidence was substantially outweighed by the danger of *unfair* prejudice. (App. 13-20). Instead, the Fourth Circuit erroneously weighed the various evidence and thus did

not endeavor to analyze the admission of the expert testimony within the confines of the legislatively enacted rules of federal evidence. As such, the decision is inadequate and erroneous. *See Daubert,* 113 S.Ct. at 2793-94.

3. The decision of the Fourth Circuit in weighing evidence in reviewing the reasonableness of an expert's opinion usurps the fact finding function of a jury in violation of the Seventh Amendment.

In its Brief in Opposition, Tyger alternatively states that the Fourth Circuit did not weigh the evidence to determine the admissibility of expert testimony and that *Daubert* requires trial judges to weigh evidence in determining admissibility. Both propositions are incorrect.

The Fourth Circuit clearly weighed the evidence in determining the admissibility of expert testimony. The Fourth Circuit determined that the testimony of certain fact witnesses was more persuasive than other fact witnesses to refute the conclusions reached by the expert witness. On this basis, the Fourth Circuit overturned substantial portions of the jury's verdict. Thus, under the guise of ruling on the admissibility of expert testimony and without adhering to the standards of review set forth in the Rules of Civil Procedure and accepted federal practice, the Fourth Circuit held that Tyger was entitled to a judgment as a matter of law. In so doing, the Fourth Circuit exceeded the acceptable bounds of controlling verdicts and encroached upon Pensacola's Constitutional right to have factual issues determined by a jury.

Contrary to the statements by Tyger, the Federal Rules of Evidence and *Daubert* do not sanction the action taken by the Fourth Circuit. While *Daubert* does interpret

the rules to allow for a preliminary investigation of the validity of scientific methodology utilized by experts, nothing in *Daubert* or the Federal Rules of Evidence authorizes a review of all of the evidence in a case to determine whether an expert's conclusions are consistent with the evidence presented. Such a review is reserved to the finder of fact.

The critical distinction between *Daubert* and the present case is that *Daubert* concerns a preliminary evaluation of the validity of a novel scientific methodology whereas the present case concerns an evaluation of the conclusions reached by an expert witness in light of all of the evidence presented. Unlike the validity of scientific methodology, the conclusions reached by experts often relate to ultimate facts. Thus, when reviewing the conclusions of experts, a court is also reviewing the sufficiency of the evidence on the ultimate facts to be decided.

In the present case the Fourth Circuit held that Pensacola could not submit expert testimony after the Fourth Circuit weighed the evidence and made factual conclusions that Pensacola failed to prove by a preponderance of the evidence that no damages associated with delay were caused by alleged misrepresentations (App. 14-15), that certain pit mines were not similar thereby precluding comparison and invalidating the calculation of damages (App. 16-17), and that an alternate pit mine was not less efficient to operate than an original mine (App. 16-18). Notably, the Fourth Circuit performed this review without limiting itself to the confines imposed on appellate courts in reviewing the denial of motion for judgment as a matter of law. In addition, these conclusions were reached by the Fourth Circuit even though there was evidence to support the contrary result, which evidence

the jury and the trial court both obviously believed since the jury rendered the verdict and the trial court denied the after-trial motion.

The review and weighing of evidence performed by the Fourth Circuit impermissibly encroached on the province of the jury. Such a practice infringes on the Seventh Amendment's guarantee of trial by jury. *Granberry v. O'Barr*, 866 F.2d 112 (5th Cir. 1988); *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165 (5th Cir. 1986).

This does not mean that trial judges cannot exercise control of expert testimony or of judgments supported by expert conclusions. Such control, however, must be exercised within the confines of the Federal Rules of Evidence and Civil Procedure to avoid impermissible encroachment on the fact finding function of the jury. In this case, the Fourth Circuit overstepped its bounds and has established a precedent which negates the Federal Rules of Evidence and throws courts and triers of facts into a quandary in all civil cases in the future utilizing expert testimony.

CONCLUSION

For the reasons stated in this and in Petitioner's Petition, this Court should grant the Writ of Certiorari to hear and determine the issues presented in the Petition.

Respectfully submitted,

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